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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

ALVA FISHER,

Petitioner,

v.

STATE OF MONTANA, EX REL, IN THE MATTER OF THE ADOPTION OF IVAN FIRECROW, A MINOR BY LEROY RUNSABOVE AND JOSEPHINE RUNSABOVE.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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STATE OF MONTANA, EX REL IN THE MATTER OF THE ADOPTION OF IVAN FIRECROW, A MINOR BY LEROY RUNSABOVE AND JOSEPHINE RUNSABOVE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

The petitioner, Alva Fisher, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Montana rendered in these proceedings on June 2, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana is reported as STATE of Montana ex rel. In the Matter of the ADOPTION OF Ivan FIRECROW, a minor by Leroy Runsabove and Josephine Runsabove, Petitioners, v. The DISTRICT COURT OF the SIXTEENTH JUDICIAL DISTRICT of the State of Montana, IN AND FOR the COUNTY OF ROSEBUD, and the Honorable Alfred B. Coate, Judge Thereof, Respondents, No. 13025. 536 P.2d 190. The full text of this opinion appears at Appendix A, infra, p. 17A. The opinion of the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud is unreported, and appears at Appendix B, infra, p. 21. The

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Advisory Opinion of the Appellate Court of the Northern Cheyenne Tribe of Indians is unreported, and appears at Appendix C, infra, p. 25.

JURISDICTION

The order or judgment of the Supreme Court of the State of Montana was entered on June 2, 1975. See Appendix A, p. 17A, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS RAISED

Leroy and Josephine Runsabove, petitioned the Sixteenth District Judical Court of the State of Montana for adoption of Ivan Firecrow, a minor and the son of your petitioner, Alva Fisher. The child was at the time a ward of the Northern Cheyenne Tribal Court, and your petitioner had temporary custody rights pursuant to order of the Tribal Court. All parties are enrolled Indians and all reside within the reservation.

The question thereby arising is:

Whether the Montana District Court has jurisdiction over an adoption petition where the would be adoptive parents, the child, and the natural parents are enrolled members of the Northern Cheyenne Tribe and reside on the reservation, and where the child is a ward of the Tribal Court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDIANCES, REGULATIONS INVOLVED

Constitution of the United States, Article I, §8, cl 3:

> "The congress shall have power—. . .[t]o regulate commerse . . . with the Indian tribes."

Constitution of the United States, Article II, §2, cl 2:

> "[The president] shall power, by and with the consent of the senate to make all treaties. . ."

25 U.S.C. § 372 (a):

> "In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be

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> recognized as an heir of a deceased Indian by virtue of an adoption—"
>
> "(1) Unless such adoption shall have been—"
>
> "(a) by a judgment or decree of a State court;"
>
> "(b) by a judgment or decree of an Indian court;"
>
> "(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or"
>
> "(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or"
>
> "(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section or in the distribution of the estate of an Indian who has died prior to that date: Provided, That an adoption by Indian custom made prior to the effective date of this section may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living, if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behlaf of a minor child approves of the recordation..."

25 U.S. C. § 1322 (a):

> "The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within the State."

Amended Constitution and Bylaws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Article IV, Section 1, cl. i, k, l, m, p, q:

> "Enumerated Powers - The Tribal Council of the Northern Cheyenne shall exercise the following powers, subject to any limitations imposed by the applicable statutes of United States and subject further to all express restrictions upon such powers contained in this Constitution and the attached Bylaws:"
>
> "(i) To promulgate and enforce ordinances, which shall

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be subject to review by the Secretary of the Interior, governing the conduct of members of the Northern Cheyenne Tribe and any other person or persons coming within the jurisdiction of the reservation, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers."

"(k) To protect and preserve the property, wildlife, and natural resources of the Tribe and to regulate the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting nonmembers of the Tribe shall be subject to review by the Secreatry of the Interior."

"(l) To cultivate and preserve native arts, crafts, culture, and Indian ceremonials."

"(m) To administer charity and to protect the health and general welfare of the Tribe."

"(p) To regulate the domestic relations of members of the Tribe and of nonmembers married into the Tribe."

"(q) To provide for the appointment of guardians for minors and mental incompetents by ordiance or resolution subject to review by the Secretary of the Interior."

Article III, Section 2, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation:

"The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe."

"Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only, adoptions so approved by the Tribal Court shall be recognized."

"On all adoptions involving nonmembers of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts."

Article IV, Section 4, cl 3, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation:

"Jurisdiction: The Tribal Court of the Northern Cheyenne Tribe shall have jurisdiction of all cases coming within the terms and provisions of this Act and shall act as a Juvenile Court in the performance of the provisions of this ordinance. The Juvenile Court shall have exclusive original jurisdiction in the following proceedings:"

"(a) Concerning any child who is delinquent."

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"(b) Concerning parents who willfully and knowingly fail to provide their children with proper food, clothing, medical attention and opportunity to attend school."

"When jurisdiction shall have been obtained by the court in the case of any child, such child shall continue under the jurisdiction of the court until he becomes twenty-one (21) years of age, unless discharged prior thereto or is confined in a state custodial or correctional institution. In trials under this ordinance the child, parent or guardian, or other persons having the care, custody, or control of such child complained against, or any other persons interested in such child, shall have the right to demand a trial by jury, which shall be granted as in other cases unless waived, or the Judge may, on his own motion, call a jury to try a case."

"The jurisdiction of the court shall extend to the child who is otherwise within the jurisdiction of the court, independent of the residence or settlement of the child's parent or guardian, provided, therefore, that the authority of the court to command the presence of the parent or otherwise proceed against the parent does not extend to the parent who is not Indian, or to the parent who is Indian but not within the exterior boundaries of the reservation, or who is otherwise not within the jurisdiction of the court as provided in Chapter 1, Section 2, of the Law and Order Code."

"The jurisdiction of the court does extend to the child whose offense or condition is such as to make him subject to the court under the provisions of this ordinance even though he may have incidentally or subsequently fled the reservation, to the extent that the court may issue a warrant and authorize the taking into cutody and the return of the child by proper authorities to the jurisdiction of the court."

STATEMENT OF FACTS

The facts relevant to the question presented by the petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

On August 20, 1974, petitioners, below, Leroy and Josephine Runsabove filed in the Montana District Court a petition for the adoption of Ivan Firecrow, a minor child, born May 10, 1965. Consent to the adoption and waiver of further notice, executed by the natural father, was filed with the petition for adoption. Petitioners, the child, and the petitioner herein are all enrolled members of the Northern Cheyenne Tribe and have resided on the Northern Cheyenne Reservation at all times pertinent to this matter.

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On July 1, 1969, Ivan Firecrow was made a ward of the Northern Cheyenne Tribal Court upon a finding that the natural mother had neglected the child. An order was entered that day giving petitioner, below, temporary custody of the child. They have had custody of the child since that time. On August 30, 1974, the Tribal Court ordered the natural mother be granted temporary custody of the child for six weeks during the summer months of 1975.

Article IV, Section 4, cl. 3, of the Revised Law and Ordinances of the Northern Cheyenne Tribe provides for continuing jurisdiction of a child made a ward of the Court as follows:

> "When jurisdiction shall have been obtained by this court in the case of any child, such child shall continue under the jurisdiction of the court until he becomes twenty-one (21) years of age..."

Montana has not assumed civil or criminal jurisdiction within the Northern Cheyenne Reservation pursuant to a Public Law 280, (Act of August 15, 1953, 67 Stat. 588) or the Federal Indian Civil Rights Act of 1968, (Act of April 11, 1968, 82 Stat. 77, 79, 20 U.S.C. § 1321-1326). See Blackwolf et. al. vs. District Court 158 Mont. 523, 526, 493 P.2d 1293 (1972).

The Northern Cheyenne Tribe is incorporated pursuant to the Wheeler-Howard Act, 25 U.S.C. § 461 et. seq. It is organized and existing under a constitution and by laws ratified by the tribe on November 2, 1935, and approved by the Secretary of Interior in November 23, 1935.

The Amended Constitution and Bylaws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation Article IV, Section I, cl. k, l, m, p, and q grant power:

> "(k) To protect and preserve the property, wildlife, and natural resources of the Tribe and to regulate the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting nonmembers of the Tribe shall be subject to review by the Secretary of the Interior."
>
> "(l) To cultivate and preserve native arts, crafts, culture and Indian ceremonials."

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> "(m) To administer charity and to protect the health and general welfare of the Tribe."
>
> "(p) To regulate the domestic relations of members of the Tribe and of nonmembers married into the Tribe."
>
> "(q) To provide for the appointment of guardians for minors and mental incompetents by ordiance or resolution subject to review by the Secretary of the Interior."

The District Court held a hearing upon the petition for adoption on October 11, 1974. The petitioner objected to the hearing alleging the District Court had no jurisdiction to hear and grant the petition for adoption and, that the matter was within the exclusive jurisdiction of the Tribal Court. Following submission of briefs on the issue of jurisdiction and receipt of an advisory opinion from the Appellate Court of the Northern Cheyenne Tribe, holding that tribal jurisdiction under the facts is exclusive, see Appendix C, infra, p. 25, the District Court issued its order holding that it had no jurisdiction over the adoption and ordered the case dismissed.

The petitioners, below, sought a writ of supervisory control before the Supreme Court of the State of Montana, which revised and remanded holding that

1. The District Court had always had jurisdiction over adoptions involving Indians.

2. Assuming the Northern Cheyenne Tribal Court has jurisdiction over adoptions among its tribal members, such jurisdiction is concurrent with state court jurisdiction.

Petitioner seeks review of the state decision by writ of certiorari.

REASONS FOR GRANTING WRIT

1. The decision below directly conflicts with this Court's rulings in the Williams case, holding that absent Acts of Congress, state courts cannot exercise jurisdiction which would infringe upon the right of Indians to make their own laws and be governed

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by them.

In Williams v. Lee, 358 U.S. 217, this Court forbade exercise of state jurisdiction where it would undermine the authority of tribal courts over reservation affairs and hense would infringe upon the right of the Indians to govern themselves. That action involved a non-Indian trader, who sued an Indian in the Arizona State Court to collect for goods sold him on credit. This Court reviewed the course of United States policy toward the Indians and affirmed the test that, "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed upon the right of reservation Indians to make their own laws and be governed by them." 358 U.S. at p. 220. This Court forbade exercise of Arizona state jurisdiction over the suit because "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hense would infringe upon the right of the Indians to govern themselves." Williams, 358 U.S. at 223.

The action of the Supreme Court of the State of Montana cannot be squared with the Williams test.

State jurisdiction does not exist pursuant to Act of Congress. The only statutes whereby this could have been accomplished are Public Law 280 (Act of August 15, 1963, 67 Stat. 588) and the Federal Indian Civil Rights Act of 1968 (Act of April 11, 1968, 82 Stat. 77, 79, 25 U.S.C. § 1321-1326). Montana and the Northern Cheyenne Tribe have never complied with the provisions of either act. See Blackwolf et. al. vs. District Court, 158 Mont. 523, 526, 493 P.2d 1293 (1972).

The Montana Supreme Court opinion states that 25 U.S.C. § 372a implies Congressional conferral of state jurisdiction over adoption matters. This provision is part of the Congressional statutes for decent and distribution and determination of heirship of Alloted Indians. Section 372a was fashioned to avoid the

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confusion which arises in these matters when adoptions by the "Indian way" are the basis for claimed heirship. All Congress intended by the statue was to establish an orderly means of determining heirship, i.e. by only recognizing adoptions consummated by judicial or quasi-judicial means. The reference to "State court" adoption was in no way a Congressional statement recognizing concurrent jurisdiction. It in no way whatsoever is concerned with jurisdictional matters.

On the contrary, Congress has indirectly established exclusive tribal court jurisdiction over this adoption matter.

The Northern Cheyenne Tribe is incorporated pursuant to Act of Congress under the Wheeler-Howard Act, 25 U.S.C., § 461 et. seq. Among other powers granted to the tribe by Congress is the power:

> "(i) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Northern Cheyenne Tribe and any other person or persons coming within the jurisdiction of the reservation, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers."
>
> "(k) To protect and preserve the property, wildlife, and natural resources of the Tribe and to regulate the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Tribe shall be subject to review by the Secretary of the Interior."
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> "(l) To cultivate and preserve native arts, crafts, culture, and Indian ceremonials."
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> "(m) To administer charity and to protect the health and general welfare of the Tribe."
>
> "(p) To regulate the domestice relations of members of the Tribe and of nonmembers married into the Tribe."
>
> "(q) To provide for the appointment of guardians for minors and mental incompetents by ordinance or resolution subject to review by the Secretary of the Interior."

Amended Constitution and Bylaws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Article IV, Section I, cl. i, k, l, m, p and q.

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Pursuant to these tribal powers the tribe inacted Section 2, Article III, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation which provides:

> "The tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe."
>
> "Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only, adoptions so approved by the Tribal Court shall be recognized."
>
> "On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, The Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts."

It is respectively submitted that this ordinance provides for exclusive tribal court jurisdiction over adoption matters where the petitioner, the child and the natural parents are enrolled members of the tribe and reside within the reservation. The Advisory Opinion of the Appellate Court of the Northern Cheyenne Tribe of Indians so holds. See Appendix C, herein, infra, p. 25.

In the present case all the parties are enrolled members of the Northern Cheyenne Tribe residing within the reservation.

The prerequisites for exclusive tribal jurisdiction as laid down in Williams are fulfilled.

Only two facts distinguish this case from Williams. First, Williams is a debt action; this case involves an adoption; Second, Williams involved a non-Indian trader; all parties here are reservation Indians.

The difference in types of actions is without significance. Although maybe not strictly an adversary proceeding as a debt action (the natural parents are not defendants) they stand in that position and defended against the adoption as such in the

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courts below. Furthermore, their natural parental rights are afforded due process protection. See Stanley vs. Illionis, 905 U.S. 645, 31 L.Ed 2d 551, 92 S.ct. 1208. Therefore, as the petitioner, Alva Fisher, is a reservation Indian, her parental rights ought to be litigated in tribal court according to tribal law, procedure and customs.

As to the second factual difference, the fact that all parties to this matter are reservation Indians is the very basis for exclusive tribal juridiction under the Tribal Code. See Article III, § 2, Revised Law and Order Ordinances, supra, p. 4. See also Advisory Opinion, Appellate Court, Northern Cheyenne Tribe, Appendix C, infra, p. 25. This Court in Williams found that "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." 358 U.S. at p. 223. The Montana Court seems to interpret Williams as holding that, although non-Indians can not subject reservation Indians to the state courts, Indians can. But the Congressional policy is not a limitation on non-Indians on the reservation but protection of "the right of reservation Indians to make their own laws and be governed by them." It then follows, that Congress intended that this right also prevent an Indian from subjecting another reservation Indian to a state court. The present case is completely an Indian matter; it involves solely reservation Indians, and subject matter of utmost interest to the Tribe—its children. This fact should not allow state jurisdiction; on the contrary, it cries out even stronger for protection of the authority of the Tribal Court. It is hard to imagine a set of facts which more completely compel the conclusion that, "to allow the exercise of state jurisdicition here would undermine the authority of the tribal courts over reservation affairs and hense would infringe on the right of the Indians to govern themselves." 358 U.S. at p. 223.

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2. The decision below directly conflicts with this Court's statement in the Williams case limiting state jurisdiction where rights of Indians would be jeopardized.

In the Williams case this Court, in reviewing Indian cases handed down since Worcester, stated that state jurisdiction would be allowed where rights of Indians are not jeopardized. 358 U.S. at p. 219. It would appear that state jurisdiction is not allowed where these rights are jeopardized. Here, according to the Tribal Ordinances on adoptions, the petitioner is granted the right to be heard in this matter before her own tribal court. The State Court decision would deprive her of this right.

Furthermore, what will be the affect upon the petitioner's temporary custody rights granted by the Tribal Court August 30, 1974, if the State Court takes jurisdicition and grants an adoption? Can the Tribal Court effectively enforce custody rights in the fact of an adoption granted by the State of Montana? These questions can only be resolved by review of the Montana decision in light of these questions.

Similar reasoning applies to the child, Ivan Firecrow, who as a reservation Indian is also entitled to similar protection.

3. The decision below effectively destroys tribal jurisdiction over a child made a ward of the Tribal Court as a dependent and neglected child.

The argument for exclusive tribal jurisdiction is even stronger when it is noted that the child was a ward of the Tribal Court long before the Runsabove couple petitioned the State Court for adoption. The child was declared neglected July 1, 1969, and was under the power of the Tribal Court from then until August 30, 1974, when the couple filed their petition with the State Court. A state court decree of adoption would in effect terminate the Tribal Court guardianship powers over the child as well as its

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powers to hear the adoption matter.

The fact that the child was a ward of the Tribal Court raises another important question when viewed with the ruling below that the Tribal Court's jurisdiction is only concurrent. Once a court of concurrent juridiction has begun to exercise its jurisdiction over a case, its authority to deal with the action is, subject to appellate review, exclusive until it is completely disposed of, and no other court of concurrent jurisdiction may interfere with the proceedings thus pending. Rio Grande R. Co. v. Gomila. 132 U.S. 478, 33 LEd. 400, 10 S.ct. 155. How can the Tribal Court fully exercise its powers as guardian of Ivan Firecrow in the pending dependant child proceedings, if the State Court at the same time may take jurisdiction of an adoption petition. It could possibly be argued that the adoption matter would not necessarily affect custody or guardianship, but it would serve no good purpose for the Runsabove couple to adopt the child in the State Court and then fail to obtain custody by order of the Tribal Court. Such a resolution of this jurisdiction problem would not only lead to endless confusion but would make the child a jurisdictional "football" and thus adversely affect his welfare.

4. The ruling of the Court below finding concurrent jurisdiction over Indian adoptions, appears to be without a precedent among the decisions of this Court.

The petitioner can find no case among the past decisions of this Court allowing concurrent jurisdiction over Indian matters. It appears that to do so would abrogate the principle often stated by this Court that Indians have been a "weak and defenseless people who are the wards of the nation, dependent upon it for protection and good faith." McClanahan v. State Tax Commission of Arizona, 411 W.S. 164, 36, L.Ed.2d, 93 S.ct. 1257, 1263.

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5. The cases cited by the Court below as authority for finding that state jurisdiction exists are not proper authority for the proposition.

The Montana Supreme Court found state jurisdiction by citing its own decisions so holding. State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292; Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, 31 St. Rep. 22. Petitioner's review of these opinions fails to reveal that such decisions so hold. The subject matter in both cases is divorce; no dicta nor citations refer to adoption matters. The petitioner respectfully questions whether there is a Montana precedent for state court jurisdiction under the facts here presented.

6. The decision below, fails to follow other decisions of the Montana Supreme Court interpreting the Williams Rule.

In the case of Kennerly v. District Court, 400 U.S.C. 423, 27 L.Ed. 2d 509, 91 S.ct. 480, this court reversed the Montana Supreme Court holding that a unilateral conferral of jurisdiction by an Indian tribe to the State Courts was consistant with the exercise of tribal powers of self-government, and therefore, state jurisdiction was reconciled with the rule laid down in the Williams case. 400 U.S. at p. 426.

Subsequent to that reversal, the Montana Supreme Court again interpreted the Williams rule. State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292; Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, Cert. den., 419 U.S. 847.

In both these cases the Montana Court laid down the rule that:

> "Before a district court can assume jurisdiction in any matter submitted to it, it must find subject matter jurisdiction by determining: (1) whether the federal treaties and statutes applicable have preempted state jurisdiction; (2) whether the exercise of state jurisdiction would interfere with reservation self-government; and (3) whether the Tribal Court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction."
>
> 512 P.2d at p. 1299.

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See also 517 P.2d at p. 896. The petitioner herein contended below that under these interpretations of Williams, and in consideration of the facts of the present case, the State Court lacked subject matter jurisdiction. In both Iron Bear and Bad Horse the Montana Supreme Court based its rulings upholding state jurisdiction over reservation divorce matters upon tribal ordinances indicating tribal intent to refrain from exercising tribal jurisdictions over divorce actions. Thus, under its criteria (2) and (3) the Montana Supreme Court found that state jurisdiction over divorce did not interfere with reservation self-government, and that the Tribal Court was not currently exercising jurisdiction, nor had it exercised jurisdiction in such a way as to preempt state jurisdiction.

In the present case consideration of criteria (2) and (3) would call for a completely different result. The Northern Cheyenne Tribe (not like the divorce ordinances examined in Iron Bear and Bad Horse) has an ordinance calling for exclusive jurisdiction over adoptions where the petitioner, child and parents are enrolled members residing on the Reservation. See Article III, Section 2, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation. See also Advisory Opinion of the Appellate Court of the Northern Cheyenne Tribe of Indians, Appendix C. infra, p. 25. Here state court jurisdiction would interefere with reservation self government, and even more importantly, the Tribal Court is exercising jurisdiction over reservation adoptions so as to preempt state jurisdiction. It is confusing that the Montana Supreme Court, in the present case ignored its own prior method for anaylsis. Instead it speaks in terms of historically exercising jurisdiction over

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adoptions, concurrent jurisdiction and of its concern that the would be adoptive parents be afforded equal access to Montana courts. Why doesn't the Williams Rule apply to the present case? Apparently the Montana Court balanced equal protection rights against Indian rights. If this is proper, what is the test for so balancing? It seems that if Williams is to be ignored, this Court ought to define the conditions under which this is proper, and formulate the test for balancing the Indian rights under Williams with Constitutional rights.

7. The impact of the decision below on tribal self-government is enormous.

In effect, the ruling below will allow any reservation Indian who cannot gain an adoption according to tribal laws, procedure, or customs, to petition the State Court for the adoption and thus effectively skirt tribal jurisdiction.

In addition, if such a practice were to be allowed, the tribal interest in the welfare of reservation Indian children could not be protected according to tribal laws, procedure and customs, because state courts would assume a number of these cases.

Also, as shown above, children made wards of the Tribal Court could, by state court adoptions, be in fact, released from tribal guardianship without the permission of the Tribal Court.

Finally, although it does not appear in the facts of this case, it is a fact that a custom exists within the Northern Cheyenne Tribe and other tribes whereby a family or clan often sits in council and decides to allow the adoption of one child of one couple to another couple, who for medical or other reasons are childless. The Tribal Court is in a better position to give deference to this and other tribal customs when entertaining an adoption petition than the State Court which must proceed strictly

according to the law and procedure of the legislature. Deference to such a custom was guaranteed by Congress and the Northern Cheyenne Tribe when they established the Tribe's constitution, bylaws and ordinances providing for exclusive tribal jurisdiction over this matter.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Opinion of the Supreme Court of the State of Montana.

Respectfully submitted.

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August 26, 1975

APPENDIX A

The opinion of the Supreme Court of the State of Montana is reported as STATE of Montana ex rel. In the Matter of the ADOPTION OF Ivan FIRECROW, a minor by Leroy Runsabove and Josephine Runsabove, Petitioners, v. The DISTRICT COURT OF the SIXTEENTH JUDICIAL DISTRICT of the State of Montana, IN AND FOR the COUNTY OF ROSEBUD, and the Honorable Alfred B. Coate, Judge Thereof, Respondents, No. 13025. 536 P.2d 190. The full text of this opinion is as follows:

CASTLES, Justice.

This a petition for a writ of supervisory control or other appropriate writ seeking relief from an order of the district court of the sixteenth judicial district, Rosebud County, which held the district court had no jurisdiction in this adoption proceeding and ordered the case dismissed.

On August 20, 1974, petitioners Leroy and Josephine Runsabove filed in the district court a petition for the adoption of Ivan Firecrow, a minor child, born May 10, 1965. Consent to the adoption and waiver of further notice, executed by the natural father, was filed with the petition for adoption. Petitioners, the child, and the natural mother are all enrolled members of the Northern Cheyenne Tribe and have resided on the Northern Cheyenne Reservation at all times pertinent to this matter.

Previously, on July 1, 1969, Ivan Firecrow was made a ward of the Northern Cheyenne Tribal Court upon a finding that the natural mother had neglected the child. An order was entered that day giving petitioners temporary custody of the child. They have had custody of the child since that time. On August 30, 1974, the tribal court ordered the natural mother be granted temporary custody of the child for six weeks during the summer months.

Article III, section 2, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation,

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reads, in pertinent part:

> "The Tribal Court of the Northern Cheyenne Reservation shall have juristiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
>
> "Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal Court shall be recognized."

The district court held a hearing upon the petition for adoption on October 11, 1974. Ivan was present at the hearing, having come from Oregon where he attends school under the auspices of the Mormon Church, during the school year. The natural mother objected to the hearing alleging the district court had no jurisdiction to hear and grant the petition for adoption and, that the matter was within the exclusive jurisdiction of the tribal court. Following submission of briefs on the issue of jurisdiction and receipt of an advisory opinion from the appellate court of the Northern Cheyenne Tribe, the district court issued its order holding that it had no jurisdiction over the adoption and ordered the case dismissed.

[1-3] We are presented with a single issue for review: Whether, upon the facts outlined above, the district court has subject matter jurisdiction over the instant petition for adoption? We hold it does have such jurisdiction.

Montana's statutes regarding adoption are in Chapter 2, Title 61, R.C.M. 1947. Section 61-202 reads:

> "Any child present within this state at the time the petition for adoption is filed, irrespective of place of birth or place of residence, may be adopted."

Section 61-204 reads:

> "Proceedings for adoption must be brought in the district court of the county where the petitioners reside."

The statutes have been complied with. Ivan was within Montana, at home with petitioners during summer vacation when the petition was filed. Petitioners' place of residence is the town of Lame Deer, county of Rosebud, state of Montana. While the residence of

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petitioners and Ivan is within the exterior boundaries of the Northern Cheyenne Reservation, that residence is also within the state of Montana. Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573.

The Northern Cheyenne Tribe is incorporated pursuant to the Wheeler-Howard Act, 25 U.S.C. § 461 et seq. It is organized and existing under a constitution and by-laws ratified by the tribe on November 2, 1935, and approved by the Secretary of the Interior on November 23, 1935. Prior to that time the courts of this state had jurisdiction over adoption matters involving Indians. State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292; Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, 31 St.Rep. 22.

The jurisdiction of the courts of the state of Montana is not divested by the subsequent, unilateral action of the Northern Cheyenne Tribe in enacting Article III, section 2, of its Revised Law and Order Ordinances, heretofore quoted. Assuming that the tribal court has jurisdiction over adoptions involving Indians, it is a jurisdiction concurrent with that of the district court. It is not an exclusive jurisdiction. The United States Congress has implicity recognized that state courts have concurrent jurisdiction over adoptions involving Indians in 25 U.S.C. § 372a. The district court having always had jurisdiction over adoptions involving Indians, 25 U.S.C. §1322 is not applicable.

This Court in Bad Horse vs. Bad Horse, 163 Mont. 445, 517 P.2d 893, 895, 31 St. Rep. 22, 25, stated:

> "Enrolled members of Indian tribes within Montana are citizens of the United States and citizens of the state of Montana. An Indian is entitled, as any other citizen, to bring an action in the courts of this state. Art. III, Sec. 6, of the 1889 Montana Constitution (Art. II, Sec. 16 of the 1972 Montana Constitution); Section 83-102, R.C.M. 1947; Bonnet v. Seekins, 126 Mont. 24, 243 P.2d 317."

Compare McCrea v. Busch, 164 Mont. 442, 524 P.2d 781, 31 St. Rep. 551, where an Indian sued a non-Indian in a state court for damages arising out of an accident on a reservation.

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[4] Being citizens of the state of Montana, petitioners and Ivan are entitled to the equal protection of the laws. Article II, Section 4, 1972 Montana Constitution. Petitioners are entitled to the use of Montana's court system on a par with other Montana citizens regardless of the fact that they are enrolled members of an Indian tribe and reside within the exterior boundaries of that Indian reservation. Petitioners and Ivan are entitled to the benefit of Montana's adoption statues, as are all Montana citizens, regardless of the fact they are enrolled members of an Indian tribe and reside within the exterior boundaries of that Indian reservation. To hold that the district court does not have subject matter jurisdiction over this controversy would be to deprive petitioners and Ivan of these rights of citizenship. It would make them something less than full citizens.

The order of the district court is reversed and the matter is remanded for further proceedings consistent with this opinion.

JAMES T. HARRISON, C. J., and JOHN C. HARRISON, HASWELL and DALY, JJ., concur.

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APPENDIX B

The opinion of the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud is unreported, and the full text of the opinion is as follows:

Petitioners are the daughter and son-in-law of the Respondent and have petitioned to adopt one of the Respondent's children. The natural father of the child has consented to the adoption. All of the parties to this proceeding are members of the Northern Cheyenne Indian Tribe and reside within the exterior boundaries of that reservation. Petitioners reside within Rosebud County, State of Montana.

At the hearing on the Petition the Respondent moved to dismiss the petition on the ground that the state court lacked jurisdiction over members of an Indian tribe who were residing within an Indian reservation. There is no question that this court is the proper court to hear the petition, if it has jurisdiction over Indians who are members of and residing within the boundaries of their reservation.

Jurisdiction cannot be conferred upon a court by the consent of the parties. In re Vincent's Estate, 133 Mont. 424, 324 P.2d 403. A decree rendered by a court without jurisdiction is void. In re Woodside-Florence Irr. Dist., 121 Mont. 346, 194 P.2d 241. Therefore it is most important that this court determine its jurisdiction and render a decision in this matter.

Congress, in 1940, recognized that state courts could have jurisdiction to grant Indian adoptions. 25 U.S.C. 372 A. That statute was not repealed by the Indian Civil Rights Act of 1968, 25 U.S.C. section 1320 et seq. Congress has never conferred adoption jurisdiction upon the states by specific legislative enactment; therefore, jurisdiction to grant adoptions over Indian people by a state court must have been conferred by tribal action.

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[illegible]

In Kennerly vs. District Court, 300 U.S. 423, 426, 91 S.Ct. 480, 482, 27 Led 2d 507, the United States Supreme Court said:

> The Court in Williams, in the process of discussing the general question of state action impinging on affairs of reservation Indians, noted that "[e] essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S., at 220, 79 S.Ct., at 271.

By this test, this court now holds that the Montana Constitution and the legislative enactments of this state, insofar as the jurisdiction of state courts over adoption proceedings is concerned, does not infringe on the right of reservation Indians to make their own laws.

This court further finds that jurisdiction over Indian adoptions, if there be such, could only be conferred by an enactment of the Northern Cheyenne Tribe. Their Ordinance, Chapter III, section 2, provides:

> Adoptions.
>
> The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
>
> Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal Court shall be recognized.
>
> On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts. (Emphasis added).

This Ordinance is subject to more than one construction; therefore, this court now certifies the following questions to the highest court of that tribe, the Northern Cheyenne Supreme Court, for its interpretation:

> 1. Does this Ordinance confer jurisdiction on the District Court of the Sixteenth Judicial District of

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[illegible]

the State of Montana to grant adoptions, to and over, members of the Northern Cheyenne Tribe?

2. If the Ordinance confers such jurisdiction on the state court, is there any restrictions on the exercise of that jurisdiction?

In the event that the Northern Cheyenne Supreme Court does not desire to certify answers to these questions within thirty days, this court will render its final decision at the expiration of that time.

Dated this 25th day of March, 1975.

/s/ Alfred B. Coate
DISTRICT JUDGE

SUPPLEMENATRY ORDER

This court certified a question of Indian law to the Appellate Court of the Northern Cheyenne Tribe of Indians concerning the jurisdiction of this court to grant adoptions to Indians of that tribe residing within the exterior boundaries of that reservation.

That court has issued its Opinion on the question and has held:

> It is the opinion of this Court, and this Court so rules, that the Tribal Court has exclusive jurisdiction of all adoptions of members of the Northern Cheyenne Tribe of Indians where it appears that the minor who is being adopted and all other parties to the adoption proceedings, which is to say, the parent and/or parents of said minor and the person and/or persons adopting said minor are each and all members of the Northern Cheyenne Tribe and each and all reside within the exterior boundaries of the Northern Cheyenne Indian Reservation.

Therefore, the court now Orders, and this does Order, that:

1. The above entitled court has no jurisdiction in this proceeding; and
2. The petition in this cause be denied and the case be dismissed.

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Dated this 18th day of April, 1975.

/s/ Alfred B. Coate
DISTRICT JUDGE

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APPENDIX C

The Advisory Opinion of the Appellate Court of the Northern Cheyenne Tribe of Indians is unreported and the full text of the opinion is as follows:

This is an extra-ordinary opinion of the Appellate Court of the Northern Cheyenne Tribe and the same is advisory only since this Court does not have any jurisdiction over the proceedings of the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud.

It appears to this Court from the information and facts presented to this Court by Judge Thomas Gardner, Tribal Judge of the Northern Cheyenne Tribal Court, that the Honorable Alfred B. Coate, District Judge of the District Court of the Sixteenth Judicial District of the State of Montana in and for the County of Rosebud, filed with said Tribal Judge a copy of an Order of said District Court which was made and entered on the 25th day of March, 1975, by said District Judge and which is entitled, "In the Matter of Adoption of Ivan Firecrow, a minor." (Adoption No. 116 of said District Court)

A copy of said Order is annexed to this Opinion for the purpose of reference to the same.

It appears to this Court that adoption proceedings are pending in said District Court and that all of the parties to the adoption proceedings are members of the Northern Cheyenne Indian Tribe and reside within the exterior boundaries of the Northern Cheyenne Indian Reservation. In said Order, his honor, the presiding Judge of said District Court, sets forth the following:

> "This court further finds that jurisdiction over Indian adoptions, if there be such, could only be conferred by an enactment of the Northern Cheyenne Tribe. Their Ordinance, Chapter III, section 2, provides:
>
> > Adoptions.
> > The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
> >
> > Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal Court shall be recognized.
> >
> > On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Court. (Emphasis added.)
>
> This Ordinance is subject to more than one construction; therefore, this court now certifies the following questions to the highest court of that tribe, the Northern Cheyenne Supreme Court, for its interpretation:
>
> 1. Does this Ordinance confer jurisdiction on the District Court of the Sixteenth Judicial District of the State of Montana to grant adoptions, to and over, members of the Northern Cheyenne Tribe?
>
> 2. If the Ordinance confers such jurisdiction on the state court, is there any restrictions on the exercise of that jurisdiction?
>
> In the event that the Northern Cheyenne Supreme Court does not desire to certify answers to these questions within thirty days, this court will render its final decision at the expiration of that time."

Under the amended Constitution and By-laws of the Northern Cheyenne Tribe which was approved by the Assistant Secretary of the Interior on July 8, 1960, by Article V, certain Enumerated Powers were provided for and authorized to be carried out as functions and duties of the Northern Cheyenne Tribal Council. Among the Enumerated Powers by the Sub-section (i) of Section 1 of Article IV, the Tribal Council, subject to any limitations imposed by applicable statutes of the United States, and subject further to all express restrictions upon such powers contained in said amended Constitution, was authorized to promulgate and enforce ordinances, which are subject to review by the Secretary of the Interior. Said Sub-section (i) reads as follows, to-wit:

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"(i) To promulgate and enforce ordinances, which shall be subject to reveiw by the Secretary of the Interior, governing the conduct of members of the Northern Cheyenne Tribe and any other person or persons coming within the jurisdiction of the reservation, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers."

Pursuant to said constitutional Enumerated Powers of the Northern Cheyenne Tribal Council, the Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation, Montana was passed and adopted by Tribal Resolution No. 23 (66) and the same was approved by the Commissioner of Indian Affairs on June 9, 1966. Chapter III of said Revised Law and Order Ordinances provides for granting of jurisdiction in the Tribal Court of adoptions among members of the Northern Cheyenne Tribe. Section 2 of said revised ordinances reads as follows, to-wit:

"SECTION 2: Adoptions:

The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.

Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only, adoptions so approved by the Tribal Court shall be recognized.

On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written concent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts."

His Honor, Judge Alfred B. Coate, as set forth in his said Order of the District Court, finds that only persons who are members of the Northern Cheyenne Tribe and who reside within the exterior boundaries of the Northern Cheyenne Indian Reservation are involved in the adoption proceedings pending before the District Court. Therefore, this Opinion will be confined to the

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status of the parties involved in the subject State Court proceedings.

In other words, non-members of the Northern Cheyenne Tribe or non-Indians or both non-members of the Northern Cheyenne Tribe and members of the Tribe as parties to the adoption proceedings pending in said adoption matter before said District Court, are not involved.

Therefore, the minor, Ivan Firecrow, and all other persons appearing in the State District Court adoption proceedings are members of the Northern Cheyenne Tribe of Indians and reside within the exterior boundaries of the Northern Cheyenne Indian Reservation.

From the factual situation found to exist by Judge Coate, as set forth in his Order, a copy of which is hereto annexed, it appears that the first two paragraphs of section 2 of Chapter III of the Tribal Code sets forth the Tribal law applicable to adoptions where the adoptive minor and all other parties involved in an adoption proceeding are members of the Northern Cheyenne Tribe and reside within the exterior boundaries of the Northern Cheyenne Indian Reservation. Therefore, in the matter at bar before the State District Court, it is not necessary for this Appellate Court to interpret or make any opinion as to the provisions of the third paragraph of said section 2 of Chapter III of the Tribal Code.

It is the opinion of this Court, and this Court so rules, that the Tribal Court has exclusive jurisdiction of all adoptions of members of the Northern Cheyenne Tribe of Indians where it appears that the minor who is being adopted and all other parties to the adoption proceedings, which is to say, the parent and/or parents of the minor and the person and/or persons adopting said minor are each and all members of the Northern Cheyenne Tribe and each and all reside within the exterior boundaries of the

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Northern Cheyenne Indian Reservation.

This Court has not been called upon to decide any issue involving non-members of the Northern Cheyenne Tribe or non-Indians or both, who wish to adopt a member of the Northern Cheyenne Tribe. Therefore, this Court does not make any opinion or interpretation as to the provisions of the last (3rd) paragraph of said Section 1 of Chapter III of the Tribal Code.

It must be understood that in making this Opinion this Court recognizes the limitations of its jurisdiction. The confines of the jurisdiction of this Court are fixed by section 6 of Chapter I of the Tribal Code, which provides that the Appellate Judge --- "will act as Appellate Judge for the Northern Cheyenne Tribal Court."

Therefore, the Opinion is made by the Appellate Court of the Northern Cheyenne Tribe at the request of the Honorable Alfred B. Coate, District Judge, as foresaid, and this extraordinary Opinion is not to be in any manner construed as an admission as "in rem" or "in personam" jurisdiction by the Courts of the State of Montana in the case at bar which is pending in the Sixteenth Judicial District before the Honorable Alfred B. Coate entitled, "In the Matter of the Adoption of Ivan Firecrow, a minor".

Since this Opinion was requested the Trial Judge of the Northern Cheyenne Tribe it is hereby ordered that a copy of this Opinion be forthwith mailed by United States mail to the Honorable Alfred B. Coate, District Judge at Forsyth, Montana and a duplicate copy be mailed to Judge Thomas Gardner, Tribal Judge.

DATED this 12th day of April, 1975.

Appellate Judge of the Northern Cheyenne Tribe of Indians.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975.

No. 75-5366

ALVA FISHER,

Petitioner,

v.

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Respondents.

Resp's Brief

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF MONTANA

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Rule 19 U. S. Supreme Court. 1

INTRODUCTION

This opposition is filed in response to the application for a writ of certiorari filed by the petitioner Alva Fisher on or about September 1st, 1975.

Respondents oppose such a review on two counts:

1. The Montana Supreme Court committed no error in reaching its decision, or in the decision itself entered on or about June 2nd., 1975; and,

2. That Rule 19 of the United States Supreme Court reads:

> "1. A review of writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Courts' discretion, indicate the character of reasons which will be considered:" (Emphasis supplied.)
>
> "(a.) Where a state court decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court." (Emphasis supplied.) 1.

The petition for a writ of certiorari should be denied therefore, because the Montana Supreme Court decision rightfully placed the Northern Cheyenne Indian generally, and the respondent prospective adoptive parents specifically, on a par with, and on a footing equal to, their black, brown and white brothers, and further held that the respondents, like all other citizens, are entitled to the equal protection of the laws, and free access to Montana State Courts. Respondents confidently contend that said judgment was in

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1. Hyde vs. Shine, 199 U. S. 62, 50 L. Ed., 90, 25 S. Ct. 760.

accord with applicable decisions of this Court. [2.]

Furthermore, where there is another adequate remedy, such as appeal or writ of error, a writ of certiorari will not issue, and must be denied therefore. [3.]

OPINIONS BELOW

The unanimous opinion of the Supreme Court of the State of Montana is reported as State of Montana ex rel. In The Matter of The Adoption of Ivan Firecrow, a minor by Leroy Runsabove and Josephine Runsabove, Petitioners, vs. The District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud, and the Honorable Alfred B. Coate, Judge Thereof, Respondents, No.13025; 536 P 2d 190. The opinion of the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud is unreported. Both these opinions are set out in toto in the appendix A at A - 1 thru A - 7.

JUDGMENTS AND ORDERS BELOW

The extra-ordinary or advisory opinion of the appellate Court of the Northern Cheyenne Tribe of Indians of April 12th, 1975, and the interlocutory Order of the Sixteenth Judicial District Court in cause No.116, of March 25th, 1975,

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2. For a judgment to stand against attack on certiorari, the inferior tribunal rendering it must have had jurisdiction of the subject matter and of the person, and to render the particular judgment. Wall vs Superior Court of Yavapai County, 93 Ariz. 344, 89 P 2d. 624; see also 132 A. L. R. 715.

3. Exparte Jordan, 41 Ala app. 590, 143 So 2d 670, cert den. 273 Ala 709, 143 So 2d, 672, cert den. 371 U. S. 895, 9 L. Ed. 2d 127, 83 S. Ct. 194.

as well as the Letter of Guardianship granted by the Sixteenth Judicial District Court on March 11th., 1970, are all three set out in toto in the appedix B., at pages B - 1 thru B - 11.

LITIGATION HISTORY AND FACTS

Ivan Firecrow a male child was born on the 10th., day of May, 1965, at Crow Agency Hospital, in the County of Big Horn, State of Montana.

Ivan is one of the issue of the marriage of Joseph and Alva Firecrow, which took place on or about April 14th., 1944 in the town of Ashland, County of Rosebud, State of Montana. These natural parents were divorced in the town of Forsyth, County of Rosebud, State of Montana, on or about June 2nd., 1969. [4.]

The petitioner, who is the natural mother, is known to have remarried at least twice legally, and was subsequent to the birth of Ivan, known as Alva Whiteman and also Alva Fisher respectively. The natural parents, the perspective adoptive parents, and the child Ivan Firecrow are all believed to be enrolled members of the Northern Cheyenne Tribe of Indians.

It is not certain when, or if, the Northern Cheyenne Tribal Court made a ward of Ivan Firecrow or the other Firecrow children, but the consensus of opinion on the

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4. The respondents respectfully request this High Court to take judicial notice of these territorial and geographical facts, which clearly show (1.) that the marriage was contracted off of the Northern Cheyenne reservation, (2.) the issue Ivan Firecrow was born off the Northern Cheyenne reservation, and (3.) that the marriage was dissolved off the Northern Cheyenne reservation by a state district Court.

reservation has it, that the natural mother abused, abandoned and neglected Ivan, and her other six children in 1968 and 1969. In any event, Respondent Josephine Runsabove, formerly Josephine Simpson by marriage was granted letter of Guardianship by the Sixteenth Judicial District State Court on March 11th., 1970. (See appendix B, page B-10 and B-11.)

If, therefore, the Tribal Court held on or about July 1st., 1969, that Ivan was a ward of that Court as petitioner maintains, then and in that event, the Tribal Court and petitioner both must have waived and relinguished jurisdiction to the Sixteenth Judicial District Court, without objection or interference with regard to the letters of Guardianship granted. March 11th., 1970 to respondents. (Cited supra, see appendix B.) Certainly the petitioner Alva Fisher, did not object or attempt to interfer with the same State District Court, which she now alleges is without jurisdiction to grant the Order of Adoption. One can only assume there was implied consent by the Tribal Court and the petitioner. It would seem, petitioner seeks to escape all the burdens of parenthood while seeking to retain all its benefits.

However, Josephine Simpson, before her first marriage was formerly Josephine Firecrow the natural female child of Joseph and Alva Firecrow and she was appointed guardian also of other Firecrow children. (See Appendix B., cited supra.) Josephine Simpson was subsequently divorced and married Leroy Runsabove on November 24th., 1971. The petition for the adoption of Ivan Firecrow was duly executed by Leroy and Josephine Runsabove on the 20th., of June 1974. A consent and waiver to this adoption was also duly executed by the natural father Joseph Firecrow on August 16th., 1974.

This petition, consent and waiver were forwarded by first class mail to the Clerk of the Sixteenth Judicial District Court on August 19th., 1974, and these were filed on or about August 20th., 1974. The Sixteenth Judicial District Court sits in the town of Forsyth, County of Rosebud, which is the County wherein the respondents and Ivan have their domicile.[5.]

An acknowledgement was received from the Clerk advising that cause No.116, and also cause No. 107, were both set down for hearing on Thursday September 12th., 1974 at 11 a. m.

Cause No. 107 involved the other Firecrow children but is not a part of the petition or necessarily a part of this opposition. Notice was sent by the Clerk to attorneys Jerome J. Cate, Esq., representing the other Firecrow children, and to James E. Seykora, Esq., representing the petitioner, now Alva Fisher.

Attorney for respondent traveled to Forsyth from Billings, and the respondents[6.] made arrangements for Ivan to fly from West Linn, Oregon, for the hearing in the custody of Mrs. Virgil Skyles, a representative of the Mormon Church. Ivan was, and still is, attending school in West Linn, under the auspices of the Mormon Church, temporarily, with the respondents permission.

The hearing was not had at the time set, however as the petitioner did not appear, but the Court was informed by Clarence Belue, Esq., of Hardin, Montana that he had in fact been substituted as counsel of record for petitioner. No

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5. Josephine Runsabove and Ivan Firecrow resided both before, and after her marriage to Leroy Runsabove, in the town of Lame Deer, County of Rosebud, State of Montana, for many years.

6. The respondents were, however petitioners in the Montana State Supreme Court and in the Montana State District Court below.

substitution of attorneys document of any kind was ever filed to respondents knowledge, however.

The Court thereupon reset the hearing for Friday, October 11th., 1974 at 10:00 a. m. and notice was sent certified mail, return receipt requested, to the natural mother.

Notice was sent to all attorneys of record including again Messrs., Cate and Seykora.

Again, on October 11th., 1974, the respondents, their counsel, Ivan, all witnesses and opposing counsel Clarence Belue, Esq., appeared at the hour set.

Messrs., Cate and Seykora did not appear.

Opposing counsel at this time first chose to challenge the jurisdiction of the District Court to grant the petition for adoption. The motion was taken under advisement, and testimony and other evidence were taken and heard, and exhibits were submitted to the Court. Briefly, the evidence showed convincingly, that the petitioner had, and still does have an alcohol drinking problem, and that she had neglected, abused and abandoned Ivan , and her other children many times years ago, and had not seen them or supported them during those many years.

At the close of the hearing the Court ordered briefs submitted on the jurisdictional question.

These briefs were deemed submitted to the lower Court on or about November 7th., 1974.

The Court issued an interlocutory Order on March 25th, 1975, referring two inquiries to the Northern Cheyenne Supreme Court as follows:

> "1. Does this Ordinance confer jurisdiction on the District Court of the Sixteenth Judicial District of the State of Montana to grant adoptions, to and over members of the Northern Cheyenne Tribe?

> 2. If the Ordinance confers such jurisdiction on the State Court, is there any restrictions on the exercise of that jurisdiction."
> (See appendix B., pages B-7 thru B-9.)

On April 12th., 1975 the appellate Judge of the Northern Cheyenne Tribe of Indians Incorporated, issued an advisory opinion in an unsigned Order to the Sixteenth Judicial District Court. [7]

The District Court issued its decision on April 18th., 1975 in conformity with the opinion of the Northern Cheyenne appellate Court, and mandated that it had no jurisdiction over the adoption, and the petition in the adoption was therefore denied and dismissed. (See appendix A, page A-7.)

The respondents filed for a Writ of Supervisory Control, on or about April 30th., 1975 with the Montana Supreme Court, together with a supporting brief. Attorney for Alva Fisher later filed an opposing brief.

The Montana Supreme Court granted an advesary hearing on May 14th., 1975 and counsel for both sides argued orally and the case was deemed submitted. (See appendix A., page A-6.)

On June 2nd 1975, the unanimous decision was rendered that the District Court errored when it had dismissed for lack of jurisdiction, and the case was reversed and remanded by the Montana Supreme Court. (See appendix A pages A-1 thru A-5.)

The petition by Alva Fisher to this High Court for a writ of certiorari followed.

PIVOTAL ISSUE

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7. The appellate Judge of the Northern Cheyenne Tribe, Inc., was at that time and is still believed to be, the tribal attorney Bert W. Kronmiller, Esq., of Hardin, Montana. (See appendix B., pages B-1 thru B-6, opinion rendered on his lithographed letterhead legal size paper, lower left hand corner.)

Did the Supreme Court of the State of Montana error in holding that the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud, has jurisdiction to render the Order of adoption, where the respondents, the child and the natural parents are all enrolled members of the Northern Cheyenne Tribe?

RESPONDENTS POSITION

It is the respondents position that the Supreme Court of the State of Montana did not error in holding that the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud, has jurisdiction to render the Order of adoption, where the respondents, the child and the natural parents are all enrolled members of the Northern Cheyenne Tribe. Since the respondents are citizens of the United States and citizens of the State of Montana, they are entitled to the equal protection of the laws and of free access to state courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS ORDINANCES AND REGULATIONS INVOLVED

Constitution of the United States, Article I, Paragraph 3 Cl. 3:

> "The congress shall have power - . . . . .
> to regulate commerce with foreign nations,
> and among the several states, and with
> the Indian tribes;"

Constitution of the United States, Article IV, Paragraph 1, and Paragraph 2:

> "Full faith and credit shall be given in
> each state to the public acts, records
> and judicial proceedings, of every other state.

> And the Congress may by general laws
> prescribe the manner in which such
> acts, records, and proceedings shall
> be proved, and the effect thereof."
>
> "The citizens of each state shall be
> entitled to all priviliges and im-
> munities of citizens in the several
> states . . . . . ."

Constitution of the United States, Amendment 10:

> "The powers not delegated to the United
> States by the constitution, nor prohibited
> by it to the states, are reserved to the
> states respectively or to the people."

Constitution of the United States, Amendment 14, Paragraph 1:

> "All persons born or naturalized in the
> United States, and subject to the
> jurisdiction thereof, are citizens of
> the United States and of the state where-
> in they reside. No state shall make or
> enforce any law which shall abridge the
> priviliges or immunities of citizens of
> the United States, nor shall any state
> deprive any person of life, liberty, or
> property, without due process of law,
> nor deny to any person within its
> jurisdiction the equal protection of
> the laws."

25 U. S. C. Paragraph 372 (a): See statute set out on pages 2 and 3 of petitioners brief.

25 U. S. C. Paragraph 1322 (a): See statute set out on page 3 second paragraph petitioners brief. (b is omitted.)

> "Force and effect of tribal ordinances or customs"
>
> (c) "Any tribal ordinance or custom heretofore
> or hereafter adopted by an Indian tribe,
> band or community in the exercise of any
> authority whcih it may posses shall, if
> not inconsistent with any applicable
> civil law of the state, be given full
> force and effect in the determination
> of civil causes of action pursuant to
> this section."

(Pub. L. 90-284, Title IV, Paragraph 402, Apr. 11, 1968, 82 Stat. 79.)

Amendend Constitution and Bylaws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Art. IV, section 1, cl., i, k, l, m, p, q.,: See, set out on pages 3 and 4 (cited supra.)

Article III, section 2, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation: See set out on page 4. (Cited supra.)

Article IV, section 4, cl 3, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation: See set out on pages 4 and 5 (Cited supra.)

LAW AND ARGUMENT
1. INTRODUCTION.

It seems only fitting and proper that here once again, just as in case No.75-145 before this High Court in this very same term, respondents have the arduous and rather awesome task of protecting individual human rights, dignities and liberties. It is not so surprising really however, since it is the individual's rights that are always the most often placed in dire jeopardy.

Although it is somewhat bewildering to understand why this is true at first, it becomes perspicuous if it is accepted as also true, that the individual is the smallest independant functional political unit of an organized society. It then follows that it is this individual's rights which are most often set diametrically opposed to those of Government by reason of this very independence.

It has been sagely proffered that the individual's rights in such a confrontation must yield to the greater rights of the society. The respondents hasten to amend and proclaim further however, that it is this very dictate when carried to its ultimate extremity, that leads inevitably to the supremacy of the Government in all things. It is this destruction of the individual's sacred liberty on the sacrificial altar of Government, that must ultimately and inevitably lead to the placement of society as supreme above all other considerations: that the

individual exists, not in and of his own right, but he exists only for the benefit of the state of which he is part.

Respondents respectfully submit that such a proposition is unsustainable in a Court of English or American Jurisprudence, and indefensible in the light of the Federal and State constitutions and statutes, and the guiding principles of the common law, and it makes no difference whether Governmental oppression takes the form of Tribal Ordinance or a Congressional Act.

2. HISTORY AND BACKGROUND.

On June 2nd., 1924, "A Bill Granting Citizenship to Indians, and for Other Purposes," (43 Stat. 253, 8 U. S. C. 3) was made law, and removed any doubt remaining that the American Indian was entitled to all his constitutional rights and protections as a matter of law. As citizens of the United States, Indians are citizens of the state in which they live,[8.] even though they may live on a reservation.[9.]

Since June 2nd., 1924 the Montana state courts have granted adoptions to Indians in countless numbers when petitioned by them.

Indians, even though living on reservations, being citizens and residents of the state in which they live, are endowed with the rights, privileges, and immunities equal to those enjoyed by all other citizens and resident of the state.[10.]

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8. Deere vs New York (DC NY) 22 F. 2d 851,affd Deere vs St. Lawrence River Power Co., (CA 2) 32 F 2d 550; Acosta vs San Diego County, 126 Cal. app. 2d 455, 272, P 2d 92; Martinez vs Southern Ute Tribe, 150 Colo. 504, 374 P 2d 691.

9. Acosta vs San Diego County, 126 Cal. app. 2d 455, 272 P2d 691.

10. Acosta vs San Diego County, 126 Cal. app 2d 455, 272 P2d 92.

The Indians private rights are secured and enforced to the same extent and in the same way as the rights of other residents or citizens of the United States.[11.] His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the U. S. as to his political and personal status.[12.]

Further, Indians, although living on a reservation and maintaining tribal relations, are amenable to the laws of the state when they are off the reservation. (Emphasis supplied; See Ex parte Moore, 28 S D 339, 133 N W 817.)

Sections 61-201 through 61-217 Revised Codes of Montana, 1947 as amended, constitute the significant sections of the "Uniform Adoption Act" approved by the National Conference of Commissioners on Uniform State Laws in 1953. (En. sec. 1, ch. 240, L. 1957.)

Under former section 61-127 as it appeared as section 310 of the Civil Code of 1895, only persons who were or might become citizens of the United States could adopt a minor child,[13.] and a difference of race was no obstacle.[14.] (Emphasis supplied.)

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11. Choate vs Trapp, 224 U. S. 665, 56 L. Ed. 941; 32 S. Ct. 565; Jones vs Meehan, 175 U. S. 1, 44 L. Ed. 49, 20 S. Ct. 1; Ladiga vs Roland, 2 How (US) 581, 11 L. Ed. 387; Missouri P. R. Co. vs Cullers, 81 Tex 382, 17 S.W. 19.

12. Choate vs Trapp, 224 U. S. 665, 56 L Ed 941; 32 S. Ct. 565.

13. State ex rel. Thompson vs District Court, 75 M 147, 156, 242 P. 959.

14. In re Pepin's Estate, 53 M. 240, 248, 163, P. 104.

Montana State Courts have granted countless numbers of Indian adoptions under both these Montana adoption laws. (Section 61-201 et seq., as amended and sections 310 et seq., Civil code of 1895, cited supra.)

The Northern Cheyenne tribe of Indians did not become a federal corporation until after the Wheeler-Howard Act of June 18th., 1934 (48 Stat. 984.) as amended by the Act of June 15th., 1935, (49 Stat. 378.) (See also 25 U. S. C. Paragraph 461, et seq.)

The incorporation and subsequent ratification was approved by the Secretary of Interior of U. S., on July 8th., 1960 all pursuant to 48 Stat. 987. It was subsequent to the incorporation of the tribe and the adoption of the articles of incorporation that the tribe enacted section 2, Article III, Revised Law and Order Ordinances pertaining to adoptions herein under consideration.

Then in 1968 "The Indian Civil Rights Act," (25 U. S. C. A. Section 1301, et seq.,) followed and became law. This is not an affirmative declaration of rights but is negative in form and forbids certain tribal action and is directed at government rather than at individuals."[15.] It was against this backdrop of history and law that Leroy and Josephine Runsabove petitioned the State District Court for the adoption of Ivan Firecrow. They both anticipated leaving the reservation with Ivan for jobs awaiting them in Portland, Oregon.

Mr. and Mrs. Runsabove did not feel that an tribal adoption decree would have any binding effect beyond the

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15. Spotted Eagle vs Blackfeet Tribe of Blackfeet Indian Reservation, City of Browning, D. C. Mont. 1969, 301 F. Supp. 85

the territorial jurisdiction of the reservation. [16.] The immunity of adoption decrees and orders from collateral attack rests on the jurisdiction of the Court in which the adoption proceedings are had; where lack of jurisdiction affirmatively appears, they are always subject to collateral attack. [17.] Many courts apply the rule that an adoption decree of a court of another state is under the provisions of the Federal Constitution entitled to full faith and credit. [18.] However, this rule does not apply to decree of tribal courts, and a tribe of North American Indians does not constitute a nation so that its laws will be recognized in a state by international comity. (See Roche vs Washington, 19 Ind. 53.)

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. (See Southern P. R. Co., vs Gonzalez, 48 Ariz. 260, 61 P 2d 377, 106 A. L. R. 1012), and there is no federal statute of adoption.

Also, the custom of Indians, which makes one caring for an bandoned or neglected child its adopted parent, and which gives to it all the rights and priveleges of a natural child, which petitioners urges in support of his petition, will not be recognized in a state court as an adoption, for the reason that an adoption is a right purely statutory - a right that

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16. See Article IV, section 4, cl 3, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation: (b) ". . . . . The authority of the court to command the presence . . . . . does not extend . . . . . to the parent who is Indian but not within the exterior boundaries of the reservation, ..." (Emphasis supplied)

17. Hughes vs Industrial Com. 69 Ariz. 193, 211 P 2d 463; Spencer vs Franks, 173 Md. 73, 195 A 306, 114 A. L. R. 263; Commonwealth ex rel Teitelbaum vs Teitelbaum, 160 Pa. super 286, 50 A 2d 713.

18. Article IV, Paragraphs 1 and 2 ; McNamara vs McNamara, 303 Ill. 191, 135 N. E. 410, Cert. den. 260 U. S. 734, 67 L. Ed. 487.

that is contrary to natural law and thus is differentiated from the right of marriage and divorce by tribal custom. (See Non-She-Po vs Wa-Win-Ta, 37 Oregon 213, 62 P 15.)

3. DOES THE MONTANA DISTRICT COURTS HAVE SUBJECT MATTER JURISDICTION OVER PETITIONS FOR ADOPTIONS INVOLVING INDIANS?

Montana's statutes regarding adoption are in Chapter 2, Title 61, R. C. M. 1947. Section 61-202 reads:

> "Any child present within this state at the time the petition for adoption is filed irrespective of place of birth or place of residence, may be adopted."

Section 61-204 reads:

> "Proceedings for adoption must be brought in the district court of the county where the petitioners reside."

These statutes have been complied with as Ivan was within Montana, at home with respondents during summer vacation when the petition of adoption was filed with the state district court. While the domicile of respondents and Ivan is Lame Deer, which is within the exterior boundaries of the Northern Cheyenne Reservation, that domicile or residence is also within the County of Rosebud, State of Montana. (See Organized Village of Kake vs Egan, 369 U. S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573.)

The Montana Supreme Court mandated in Bad Horse vs Bad Horse, 163 Mont. 445, 517 P 2d 893, 895, 31 St. Rep. 22, 25,;

> "Enrolled members of Indian tribes within Montana are citizens of the United States and citizens of the State of Montana. An Indian is entitled, as any other citizen, to bring an action in the courts of this State. Art. III, se. 6, of the 1889 Montana Constitution (Art. II, sec. 16 of

the 1972 Montana Constitution);Section 83-102, R. C. M. 1947; Bonnet vs Seekins, 126 Mont. 24, 243 P 2d 317" 19. (Emphasis supplied.)

Indians have certainly been entitled, as any other citizen to bring actions in courts of this state since June 2d, 1924, and before.

(See also State ex rel. Iron Bear vs District Court, 162 Mont. 335, 512 P 2d 1292.)

4. APPLICATION OF INDIAN CIVIL RIGHTS ACT OF 1968

It is true, that the State of Montana has assumed complete jurisdiction over only the Flatehead Indian Reservation, and has not acted as to the other six reservations, but the State of Montana still retains jurisdiction over areas of law, where there is neither a governing act of Congress nor infringement with reservation self government. (Emphasis supplied; See Indian Civil Rights Act of 1968,Sections 401-406, 25 U. S. C. A., sections 1302-1326, cited supra.)

The U. S. Government has tendered civil and criminal jurisdiction to the state, but Montana has not acted as to the other six reservations, and the Northern Cheyenne Tribe has not tendered their consent or desire to have state jurisdiction applied within the territorial jurisdiction of the reservation as to all civil and criminal matters. (See 25 U. S. C. A 1302

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19. Compare also McCrea vs Busch, 164 Mont. 442, 524, P. 2d 781, 31 St. Rep. 551, where an Indian sued a non-Indian in a state court for damages arising out of an accident on a reservation.

(a.) cited supra.)

Obviously, this would eliminate entirely the need for Tribal Court. This is however not the issue presented.The Montana Supreme Court in exercising jurisdiction over Indian adoptions, which State District Courts have exercised traditionally since 1924; the State of Montana has therefore exercised this jurisdiction first in time and it would seem that Tribal Court jurisdiction has been pre-empted thereby.

In support of this proposition respondets hasten to quote 25 U. S. C. A., Section 1322(c.) which pertains to, "Force and effect of Tribal ordinances or customs.," and reads:

> "Any tribal ordinance or custom heretofore or hereafter adopted by an Indian Tribe, band or community in the exercise of of an authority which it may possess, shall, if not inconsistent with any aplicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section." (Emphasis supplied.)

Here is the crucial salient point, for the Northern Cheyenne Adoption Ordinance Article III, section 2 is certainly inconsistent with Chapter 2, R. C. M., sections 61-201, et seq., (cited supra."The Uniform Adoption Act.") If the jurisdiction of the tribal court is exclusive, as the petitioner insist, then the Tribal Ordinance is inconsistent with The Montana State Constitution of 1889, Art. III, sec. ii, and the Montana State Constitution of 1972, art. II, sec. 31, and article IV Paragraphs 1 and 2 of the U. S. Constitution.)

The common understanding of 25 U. S. C. A. section 1322(c.) is that any tribal ordinance heretofore or hereafter adopted would be given full force and effect if not inconsistent with state law.(Established rule that legislative acts must be

taken in accord with common understanding, Adams vs Osage Tribe of Indians 59 F. 2d 653.) It is within the power of Congress to provide that the laws of a state shall extend over and apply to Indian country. (See Warren Trading Post Co., vs. Arizona State Tax Com. 380 U. S. 685, 14 L. Ed. 2d 165, 85 S. Ct. 1242; Eddy vs Lafayette, 163 U. S. 456, 41 L. Ed. 225, 16 S. Ct. 1082.)

Nothing in 25 U. S. C. A. section 1302 et seq., forbids the state to act; on the contrary, section 1321(a.) grants jurisdiction to the state to act, with the consent of the tribe, over civil and criminal areas of law where the states have not heretofore had any prior jurisdiction. (See also 25 U. S. C. A. section 1322(a.) However, the state court clearly already had jurisdiction of adoptions prior to the enactment of the applicable tribal ordinance and/or the 1968 Indian Bill of Rights Act, and therefore its jurisdiction is valid. (See 25 U. S. C. A., section 1322(c.) cited supra,) and state court may exercise Pendent Jurisdiction; See Spotted Eagle vs Blackfeet Tribe of Blackfeet Indian Reservation, City of Browning, D. C. Mont. 1969, 301 F. supp. 85.)

The provisions of section 1301 et seq., of 25 U. S. C. A., relating to Indians imposed new responsibilities upon Indian tribes with respect to both the manner in which it could exercise its governmental powers and the objectives that it could pursue through their implementation. (See Dodge vs Nakai, D. C. Ariz. 1969 298 F. Supp. 26; and also a similar federal situation is involved in the subject of insurance, where the Federal Government under the Ferguson McCarron Act, Public Law 15, states it will exercise its jurisdiction and regulate insurance to the extent that the state do not do so, even

though insurance is interstate commerce. U. S. vs South-Eastern Undewriters Assn., 322 U. S. 533, 64 Supp. Ct. 1162, 88 L. Ed. 1440 (1944.)

5. THERE IS NO CONFLICT WITH THE WILLIAMS CASE DECISION.

Even since Worcester vs Georgia, 31 U. S. (6 Pet. 515), 8 L. Ed. 483 (1832), and followed by Williams vs Lee, 358 U. S. 217, 220, 79 S. Ct. 269, 270, 3 L. Ed. 2d, 251, 254 (1959), this High Court defined the power of Indian Tribal Government and the authority of the Congress of the U. S. as it concerned the jurisdictional question.

In Williams the Court laid down this test:

> "Essentially, absent governing acts of congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." (Emphasis supplied cited supra.)

Here again, is a salient point that petitioner is unwilling or unable to perceive is Congress has acted and has indicated that "Any tribal ordinance . . . . . heretofore or hereafter adopted . . . . . shall" be given force and effect . . . . . "if not inconsistent . . . . ." with state law. (See 25 U. S. C. A., section 1322(c)).

There is a governing act of Congress but it specifically disavows tribal authority where it is inconsistent with state law.(Cited supra.) The petitioners fail to realize that at the time of the Williams decision there was no Indian Civil Rights Act. (See 25 U. S. C. A., section 1301 et seq., April 11th, 1968, 82 Stat. 77.) Besides, the factual situation in the Williams case all took place on the reservation lands, and

and involved contract, while the marriage, the birth, or the divorce in the case at bar all took place off the Northern Cheyenne reservation. (See footnote 4. under Litigation History and Facts. Cited supra.) The petition for adoption was also filed in the State District Court off the reservation.

Also, the Williams case declared that state jurisdiction would be allowed where rights of Indians are not jeopardized. (See 358 U. S. at page 219 cited supra.) Here, under the facts, the rights of the respondents of free access to state courts are in jeopardy, and they further are denied. . . . "the equal protection of the laws" if denied access to state court.

6. EXCLUSIVE VS. CONCURRANT JURISDICTION

Concurrent jurisdiction means:

> "The jurisdiction of several different tribunals, each authorized to deal with the same subject-matter at the choice of the suitor." 20.(Emphasis supplied.)

Exclusive jurisdiction means:

> "These words preclude idea of co-existence, and means possessed to exclusion of others."21

To grant "exclusive jurisdiction" to the tribal court under the facts of this case would permit the tribal court to prevent the respondent from having free access to state courts, and equal protection of the laws thereby, permitting the tribal

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20. Cashman vs Vickers, 69 Mont. 516 223 P 897, 898; and Black's Law Dictionary, Revised Fourth Edition, Page 363.

21. Dunn Const. Co., vs Craig, 191 Miss. 682, 2 SO. 2d 166, 171; Black's Law Dictionary Revised Fourt Edition, Page 673; also the words "exclusive jurisdiction" when used in statutes with respect to inferior criminal courts were only intended to define jurisdiction of inferior criminal courts established thereby as between themselves.(See People ex rel Kawicki vs Carhart, 170 Misc. 894, 13 N. Y. S. 2d 293, 294.

court, or the government to accomplish indirectly that which it could not accomplish directly. In other words the tribal court could "chain" the respondents to the reservation compelling them to seek redress there only of their grievences.[22.]

Any attempt in Article III, section 2, paragraphs 1,2,3 or elsewhere, in the Northern Cheyenne Tribal Ordinance of Adoptions, (cited supra) to unilaterally restrict an enrolled Northern Cheyenne, or for that matter a non-Indian, from the free acess to state courts and the equal protection of the laws is a violation of Article 1, section 9, clause 3, and amendment V of the U. S. Constitution.[23.] If the Montana Supreme Court where to uphold the alleged "exclusive jurisdiction" of the tribal court and denie respondents the free access to state courts and the equal protection of the laws, then the state judiciary would violate the U. S. C. Amendment 14, Paragraphs 1 and 2. (Cited supra.) No other result can with reason and logic be reached without doing deliberate violence to the express language of the U. S. Constitution. Not even the Congress in its exercise of the "commerce clause,"[24.] powers over Indians, can with impunity violate by legislation

---

22. (See Acosta vs. San Diego County, cited supra.) If respondents were any where in the world, they would have to return to the reservation in order to secure a decree of adoption from the tribal courts, "exclusive jurisdiction."

23. "No bill of attainder or ex post facto law shall be passed." Although, this applies to the Federal Government it would naturally follow that it would apply equally to the federal arm of corporate creation; the Tribe Inc., otherwise, the Federal Government could accomplish by the back door that which it could not accomplish by the front. (Tribal Ordinance was not passed and approved until June 9th, 1966.) Johnson vs. Virginia, 373 U. S. 61, 10 L. Ed. 195; and 15 Am Jur 2d Civil Rights section 38.

24. U. S. Constitution, Art. I, Paragraph 8, clause 3.

some other equally valid constitutional provision protecting them. [25].

Respondents submit that so long as respondents voluntarily remain within the exterior boundaries of the reservation, and petition the tribal court for relief "at the choice of the suitor," then the tribal court retains jurisdiction. However, if the respondents step off the reservation and petition a state court, then the state court has jurisdiction of both subject matter and of the person,"at the choice of the suitor" [26].

Respondents respectfully submit, that the tribal court can be said at best to exercise a "concurrant jurisdiction" over Indian adoptions merely. (State exercised adoption jurisdiction over Indians since 1924; Tribal Court did not exercise jurisdiction under adoption ordinances until after June 9, 1966.)

7. SUMMARY, AND 25 U. S. C. A. 372(a.)

The courts [27]. have agreed that before a state court can assume jurisdiction of a civil case in which an Indian is concerned, it must;

(1.) find subject matter jurisdiction by determining whether federal treaties and statutes applicable have pre-empted state jurisdiction;

---

25. U. S. Constitution, Amendment V; Choate vs Trapp, 224 U. S. 665.

26. See cited supra [illegible] 20., and also Ex parte Moore, 28 S. D. 334,(cited supra.)

27. Including Montana Supreme Court, see State ex rel Iron Bear vs District Court, 515 2d 1292.

(2.) whether exercise of state jurisdiction would interfere with reservation self government; and

(3.) whether tribal court is currently exercising jurisdiction, or has exercised jurisdiction in such manner as to pre-empt state jurisdiction.

It has been well established that the state has subject matter jurisdiction. (See chapter 2 R. C. M. section 61-201 et seq., "Uniform Adoption Act.") It has also been established that there are no federal treaties or statutes applicable that have pre-empted state jurisdiction. (See Wheeler-Howard Act, June 18th, 1934; 48 Stat. 984. et seq.) The incorporation of the Northern Cheyenne Tribe followed the act that made the Northern Cheyenne Indians citizens on June 2nd., 1924. (43 Stat. 253, cited supra.) The Tribal Ordinance was passed June 9th, 1966. Any unilateral action by the Tribal Corporation seeking to divest the state of jurisdiction exercised over Indian adoptions since June 2nd, 1924, would violate Article I, section 9, clause 3, and Amendment V, of the U. S. Constitution. Any attempt by the states to enforce exclusive jurisdiction of tribal courts would violate U. S. C. Amendment 14, paragraphs 1. and 2. (Cited supra.) The Indian Civil Rights Act of 1968,(25 U. S. C. A., section 1302 et seq., cited supra.,) tendered jurisdiction over civil and criminal matters to the states, where the states had not heretofore had any prior jurisdiction. Montana acted as to one reservation only. However, the state may exercise Pendent Jurisdiction, (see Spotted Eagle vs Blackfeet Tribe, et al, cited supra.), and, in addition Montana has exercised Indian adoption jurisdiction since 1924, and "any tribal ordinance . . . . . heretofore or hereafter adopted shall . . . ." be given force and effect . . . . ."if not inconsistent" with state law.

(see 25 U. S. C. A. section 1322(c).) there has been therefore, no pre-emption of state law by federal statute, but on the contrary permission is given by federal statute to exercise state authority. (Section 1302, et seq., cited supra.) Also, under 25 U. S. C. A. section 1322(c) the tribal ordinance is expressly forbidden when inconsistent with state law. Again, in 25 U. S. C. A. 1302(9.)the tribe is forbidden to pass any bill of attainder or ex post facto law. (See also Dodge vs Nakai, D. C. Ariz. 1969, 298 F. Supp. 26; Locke vs New Orleans, 4 Wall. 172.)

Whether the exercise of state jurisdiction would interfere with reservation self government is extremely remote. State courts have exercised Indian adoption proceedings since 1924, and to hold now that the tribal courts have "exclusive jurisdiction" to grant these adoptions, would subject every Indian adoption ever granted by a state court under the same or similar circumstances open to collateral attack. This would be a legal absurdity, and would be detrimental to both Indian tribes and individual Indians. This is not a suit for debt as in the Williams case,(cited supra.), that was consumated from an act or transaction, that arose exclusively on the reservation, that the tribal court can be said to have exclusive jurisdiction of, but it is rather the petition of an adoption of an Indian child after its abandonment and it involves only private personal rights. (See Grimes vs Grimes, 207 N. C. 778, 178 S. E. 573.) The natural parents were married off the reservation, (Ashland, Montana) and the child Ivan, was born off the reservation, (Crow Agency, Montana) and the divorce took place off the reservation. (Forsyth, Montana.) The respondents left the reservation and petitioned a state court

for the adoption, and the tribal court was never petitioned for the adoption and therefore never even acquired jurisdiction over this adoption. (see Article IV, section 4, cl 3, paragraph 3, cited supra.) In fact, under Article III, section 2, clause 3, Northern Cheyenne Tribal Ordinances (cited supra) reads:

> "On . . . . . shall have concurrent jurisdiction . . . . . , adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consumated in the State Courts." (Emphasis supplied.)

Here, express permission is given by the tribe to state adoptions over Indians, and the petitioner or the tribe, should not now be heard to complain, that this is interference with reservation self government when they have given their consent to it. (Consensus Facit Legem - consent makes the law; and see, Glantz vs Gabel, 66 Mont. 134, 212 P 858, 860.)

The question of whether the tribal court is currently exercising jurisdiction, or has exercised jurisdiction in such manner as to pre-empt state jurisdiction has already been answered specifically by prior law and argument. (See State ex rel Iron Bear, et al., cited supra, and Bad Horse vs Bad Horse, 163 Mont. 445, 517 P 2d 893. State vs Mary Iron Bull vs District Court, 515 P 2d 1292.)

In addition, there has been an express unequivocable recognition by the U. S. Government of state adoption. (See 25 U. S. C. A. 372(a).)

> "In probate matters . . . . . , no person shall be recognized as an heir of a deceased Indian by virtue of an adoption _____
> (1.) Unless such adoption shall have been _____
> (a.) by a judgment or a decree of a State Court;
> (b.) by a judgment or a decree of an Indian Court . . . . . " (Emphasis supplied.)

There is no valid judicial forensic argument that petitioner has submitted, or can submit, that can alter the express intent of Congress which under U. S. C. A. 372(a) is that state court adoptions over Indians "shall be recognized." (Cited supra.) In fact, if the chronological order has significance, it shows that state courts adoptions are preferred over Indian court adoptions. (See 372(a) cited supra.)

Although every "retrospective act" is not necessarily an ex post facto law, that phrase embraces only such laws as impose or effect "penalties or forefeitures." (See Locke vs New Orleans, 4, Wall 172, 18 L. Ed. 334.)

It is also true that by all the years (1924 to 1966, about 42 years) of acquiescence by the tribe to the state jurisdiction over adoptions it can be argued that the tribe "assented" or even "consented" to that state jurisdiction and now it is estopped to denie it.

(See People vs Lowe, 205 N. Y. S. 77, 78, 209 app. Div. 495; Perryman vs State, 63 Ga. app. 819, 12 S. E. 2d 388, 390; and Bartlett vs Sundin; 169 N. Y. S. 391, 393, 182 app. Div. 117; and "consent" is sometimes synonymous with "waiver". Dahlquist vs Denver & R. G. R. Co., 52 Utah 438, 174 P. 833, 844.)

CONCLUSION

Being citizens of the State of Montana, respondents and Ivan are entitled to the equal protection of the laws. (Article II, section 4, 1972 Montana Constitution and U. S. C. Amendment Fourteen, cited supra.)Respondents are entitled

to the use of Montana's court system on a par with other Montana citizens regardless of the fact that they are enrolled members of an Indian Tribe and reside within the exterior boundaries of that Indian reservation. Respondents and Ivan are entitled to the benefit of Montana's adoption statutes, as are all Montana citizens, regardless of the fact they are enrolled members of an Indian Tribe and reside within the exterior boundaries of that Indian reservation. To hold that the state district court does not have subject matter jurisdiction over this controvercy would be to deprive respondents and Ivan of these rights of citizenship. It would make them something less than full citizens.

Besides, even under the corporate charter of the Northern Cheyenne Tribe, ratified November 7th, 1936 further limits the tribe's power under Article 5, "corporate powers", reads:

> "The Tribe, subject to any restrictions contained in the U. S. Constitution and laws of the United States. . . . . shall have the following corporate powers . . . . . ."
> (Insert supplied and emphasis supplied.)

Petitioner is unable or unwilling to reconcile the Williams case, (cited supra) to the case at bar, because he is not applying its principles to a different factual situation, and is not up dating it to the myriad of sophisticated federal and state statutes, that now apply that did not apply at the time the decision was rendered.

The decision of the "alleged" Northern Cheyenne Supreme Court which is in reality the decision of the Northern Cheyenne Tribal Attorney, (Burt W. Kronmiller, Esq., see footnote 7.) should be given little, if any weight since, "A fox should not be one of a jury at the trial of a goose."

Public Law 280 (Act of 1953), 67 Stat. 589, and the Indian Civil Rights Act of 1968, 82 Stat. 73, while not attempting to culturally assimulate the Indian, are clear and unequivocable intentions of the Congress to place the Indian in a legal status similar to that of his black, brown and white brothers and abolish laws that adversely discriminate against Indians. To denie respondents access to state courts is to compel him to seek redress from the tribal court only, thereby figuratively chaining him, and making him a slave to the very reservation he may seek to leave.

Such a holding is abhorrent to the U. S. and Montana's State Constitutions and statutes and repugnant to U. S. Supreme Court decisions, and antagonistic to applicable principles of the English Common Law. The writ of certiorari must be denied.

Dated this 25th day of September, 1975.

Respectfully submitted,

Lewis E. Brueggemann
256-58 Hart-Albin Building
Billings, Montana 59101
Attorney for Respondents.

APPENDIX A

OPINIONS BELOW

No. 13025

IN THE SUPREME COURT OF THE STATE OF MONTANA

1975

STATE OF MONTANA, ex rel IN THE MATTER OF THE ADOPTION OF IVAN FIRECROW, a minor by LEROY RUNSABOVE and JOSEPHINE RUNSABOVE,

Petitioners,

-vs-

THE DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF ROSEBUD; and THE HONORABLE ALFRED B. COATE, JUDGE THEREOF,

Respondents.

ORIGINAL PROCEEDING:

Counsel of Record:

For Petitioners:

Lewis E. Brueggemann, argued, Billings, Montana

For Respondents:

Clarence T. Belue argued, Hardin, Montana

Submitted: May 14, 1975

Decided: JUN 2 1975

Filed: [illegible]

Thomas J. Kearney Clerk

Mr. Justice Wesley Castles delivered the Opinion of the Court.

This is a petition for a writ of supervisory control or other appropriate writ seeking relief from an order of the district court of the sixteenth judicial district, Rosebud County, which held the district court had no jurisdiction in this adoption proceeding and ordered the case dismissed.

On August 20, 1974, petitioners Leroy and Josephine Runsabove filed in the district court a petition for the adoption of Ivan Firecrow, a minor child, born May 10, 1965. Consent to the adoption and waiver of further notice, executed by the natural father, was filed with the petition for adoption. Petitioners, the child, and the natural mother are all enrolled members of the Northern Cheyenne Tribe and have resided on the Northern Cheyenne Reservation at all times pertinent to this matter.

Previously, on July 1, 1969, Ivan Firecrow was made a ward of the Northern Cheyenne Tribal Court upon a finding that the natural mother had neglected the child. An order was entered that day giving petitioners temporary custody of the child. They have had custody of the child since that time. On August 30, 1974, the tribal court ordered the natural mother be granted temporary custody of the child for six weeks during the summer months.

Article III, section 2, Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation, reads, in pertinent part:

> "The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
>
> "Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal Court shall be recognized."

The district court held a hearing upon the petition for adoption on October 11, 1974. Ivan was present at the hearing, having come from Oregon where he attends school under the auspices of the Morman Church, during the school year. The natural mother objected to the hearing alleging the district court had no jurisdiction to hear and grant the petition for adoption and, that the matter was within the exclusive jurisdiction of the tribal court. Following submission of briefs on the issue of jurisdiction and receipt of an advisory opinion from the appellate court of the Northern Cheyenne Tribe, the district court issued its order holding that it had no jurisdiction over the adoption and ordered the case dismissed.

We are presented with a single issue for review: Whether, upon the facts outlined above, the district court has subject matter jurisdiction over the instant petition for adoption? We hold it does have such jurisdiction.

Montana's statutes regarding adoption are in Chapter 2, Title 61, R.C.M. 1947. Section 61-202 reads:

> "Any child present within this state at the time the petition for adoption is filed, irrespective of place of birth or place of residence, may be adopted."

Section 61-204 reads:

> "Proceedings for adoption must be brought in the district court of the county where the petitioners reside."

The statutes have been complied with. Ivan was within Montana, at home with petitioners during summer vacation when the petition was filed. Petitioners place of residence is the town of Lame Deer, county of Rosebud, state of Montana. While the residence of petitioners and Ivan is within the exterior boundaries of the Northern Cheyenne Reservation, that residence is also within the state of Montana. Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562, 7 L ed 2d 573.

The Northern Cheyenne Tribe is incorporated pursuant to the Wheeler-Howard Act, 25 U.S.C. § 461 et seq. It is organized and existing under a constitution and by-laws ratified by the tribe on November 2, 1935, and approved by the Secretary of the Interior on November 23, 1935. Prior to that time the courts of this state had jurisdiction over adoption matters involving Indians. State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292; Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, 31 St.Rep. 22.

The jurisdiction of the courts of the state of Montana is not divested by the subsequent, unilateral action of the Northern Cheyenne Tribe in enacting Article III, section 2, of its Revised Law and Order Ordinances, heretofore quoted. Assuming that the tribal court has jurisdiction over adoptions involving Indians, it is a jurisdiction concurrent with that of the district court. It is not an exclusive jurisdiction. The United States Congress has implicitly recognized that state courts have concurrent jurisdiction over adoptions involving Indians in 25 U.S.C. § 372a. The district court having always had jurisdiction over adoptions involving Indians, 25 U.S.C. § 1322 is not applicable.

This Court in Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, 895, 31 St.Rep. 22, 25, stated:

> "Enrolled members of Indian tribes within Montana are citizens of the United States and citizens of the state of Montana. An Indian is entitled, as any other citizen, to bring an action in the courts of this state. Art. III, Sec. 6, of the 1889 Montana Constitution (Art. II, Sec. 16 of the 1972 Montana Constitution); Section 83-102, R.C.M. 1947; Bonnet v. Seekins, 126 Mont. 24, 243 P.2d 317."

Compare McCrea v. Busch, 164 Mont. 442, 524 P.2d 781, 31 St.Rep. 551, where an Indian sued a non-Indian in a state court for damages arising out of an accident on a reservation.

Being citizens of the state of Montana, petitioners and Ivan are entitled to the equal protection of the laws. Article II, Section 4, 1972 Montana Constitution. Petitioners are entitled to the use of Montana's court system on a par with other Montana citizens regardless of the fact that they are enrolled members of an Indian tribe and reside within the exterior boundaries of that Indian reservation. Petitioners and Ivan are entitled to the benefit of Montana's adoption statutes, as are all Montana citizens, regardless of the fact they are enrolled members of an Indian tribe and reside within the exterior boundaries of that Indian reservation. To hold that the district court does not have subject matter jurisdiction over this controversy would be to deprive petitioners and Ivan of these rights of citizenship. It would make them something less than full citizens.

The order of the district court is reversed and the matter is remanded for further proceedings consistent with this opinion.

Wesley Castles
Justice

We Concur:

James T. Harrison
Chief Justice

John Conway Harrison

Frank I. Haswell

Gene B. Daly
Justices.

ATTEST: A true copy
Thomas J. Kearney
CLERK SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 13025

STATE OF MONTANA, ex rel. IN THE MATTER OF THE ADOPTION OF IVAN FIRECROW, a minor by LeROY RUNSABOVE and JOSEPHINE RUNSABOVE,

Petitioners,

vs.

THE DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF ROSEBUD; and THE HONORABLE ALFRED B. COATE, JUDGE THEREOF,

Respondents.

ORDER

PER CURIAM:

Petitioners have filed in this Court a petition for a writ of supervisory control, or other appropriate writ, to vacate, annul or otherwise set aside an order of dismissal entered by the respondent court in a proceeding pending therein entitled: In the Matter of the Adoption of Ivan Firecrow, a Minor.

Counsel was heard ex parte and the matter taken under advisement. The Court having now considered the matter desires an adversary hearing before any further proceedings are had in said matter and therefor order that such an adversary hearing be held on May 14, 1975, at the hour of 1:30 p.m. on said day.

Counsel for petitioners shall within five days serve copies of this Order, the petition and brief upon the respondent Judge, and also upon opposing counsel.

Any pleadings desired, as well as briefs, may be in typewritten form and should be served and filed on or before May 12, 1975.

DATED this 30th day of April, 1975.

IN THE DISTRICT COURT OF THE SIXTEENTH DISTRICT, OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF ROSEBUD.

IN THE MATTER OF THE ADOPTION OF IVAN FIRECROW, a Minor. **ORDER**

This court certified a question of Indian law to the Appellate Court of the Northern Cheyenne Tribe of Indians concerning the jurisdiction of this court to grant adoptions to Indians of that tribe residing within the exterior boundaries of that reservation.

That court has issued its Opinion on the question and has held:

> **It is the opinion of this Court, and this Court so rules, that the Tribal Court has exclusive jurisdiction of all adoptions of members of the Northern Cheyenne Tribe of Indians where it appears that the minor who is being adopted and all other parties to the adoption proceedings, which is to say, the parent and/or parents of the minor and the person and/or persons adopting said minor are each and all members of the Northern Cheyenne Tribe and each and all reside within the exterior boundaries of the Northern Cheyenne Indian Reservation.**

Therefore, the court now Orders, and this does Order, that:

1. **The above entitled court has no jurisdiction in this proceeding; and,**
2. **The petition in this cause be denied and the case be dismissed.**

Dated this 18th day of April, 1975.

Alfred B. Coate
District Judge

EXHIBIT "A"

APPENDIX B.

JUDGMENTS AND ORDERS BELOW

IN THE APPELLATE COURT OF THE NORTHERN CHEYENNE TRIBE OF INDIANS

IN THE MATTER OF THE ADOPTION OF

IVAN FIRECROW,

a minor.

EXHIBIT "A"

O P I N I O N

This is an extra-ordianary opinion of the Appellate Court of the Northern Cheyenne Tribe and the same is advisory only since this Court does not have any jurisdiction over the proceedings of the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud.

It appears to this Court from the information and facts presented to this Court by Judge Thomas Gardner, Tribal Judge of the Northern Cheyenne Tribal Court, that the Honorable Alfred B. Coate, District Judge of the District Court of the Sixteenth Judicial District of the State of Montana in and for the County of Rosebud, filed with said Tribal Judge a copy of an Order of said District Court which was made and entered on the 25th day of March, 1975 by said District Judge and which is entitled,"In the Matter of Adoption of Ivan Firecrow, a minor." (Adoption No. 116 of said District Court)

A copy of said Order is annexed to this Opinion for the purpose of reference to the same.

It appears to this Court that adoption proceedings are pending in said District Court and that all of the parties to the adoption proceedings are members of the Northern Cheyenne Indian Tribe and reside within the exterior boundaries of the Northern Cheyenne Indian Reservation. In said Order, his honor, the presiding Judge of said District Court, sets forth the following:

> "This court further finds that judisdiction over Indian adoptions, if there be such, could

> only be conferred by an enactment of the Northern Cheyenne Tribe. Their Ordinance, Chapter III, section 2, provides:
>
> > Adoptions.
> > The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
> >
> > Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal Court shall be recognized.
> >
> > On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Court. (Emphasis added.)
>
> This Ordinance is subject to more than one construction; therefore, this court now certifies the following questions to the highest court of that tribe, the Northern Cheyenne Supreme Court, for its interpretation:
>
> 1. Does this Ordinance confer jurisdiction on the District Court of the Sixteenth Judicial District of the State of Montana to grant adoptions, to and over, members of the Northern Cheyenne Tribe?
>
> 2. If the Ordinance confers such jurisdiction on the state court, is there any restrictions on the exercise of that jurisdiction?
>
> In the event that the Northern Cheyenne Supreme Court does not desire to certify answers to these questions within thirty days, this court will render its final decision at the expiration of that time."

Under the amended Constitution and By-laws of the Northern Cheyenne Tribe which was approved by the Assistant Secretary of the Interior on July 8, 1960, by Article V, certain Enumerated

Powers were provided for and authorized to be carried out as functions and duties of the Northern Cheyenne Tribal Council. Among the Enumerated Powers by the Sub-section (i) of Section 1 of Article IV, the Tribal Council, subject to any limitations imposed by applicable statutes of the United States, and subject further to all express restrictions upon such powers contained in said amended Constitution, was authorized to promulgate and enforce ordinances, which are subject to review by the Secretary of the Interior. Said Sub-section (i) reads as follows, to-wit:

> "(i) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Northern Cheyenne Tribe and any other person or persons coming within the jurisdiction of the reservation, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers."

Pursuant to said constitutional Enumerated Powers of the Northern Cheyenne Tribal Council, the Revised Law and Order Ordinances of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation, Montana was passed and adopted by Tribal Resolution No. 23 (66) and the same was approved by the Commissioner of Indian Affairs on June 9, 1966. Chapter III of said Revised Law and Order Ordinances provides for granting of jurisdiction in the Tribal Court of adoptions among members of the Northern Cheyenne Tribe. Section 2 of said revised ordinances reads as follows, to-wit:

> "SECTION 2: Adoptions:
>
> The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
>
> Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only, adoptions so approved by the Tribal Court shall be recognized.
>
> On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who

> wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts."

His Honor, Judge Alfred B. Coate, as set forth in his said Order of the District Court, finds that only persons who are members of the Northern Cheyenne Tribe and who reside within the exterior boundaries of the Northern Cheyenne Indian Reservation are involved in the adoption proceedings pending before the District Court. Therefore, this Opinion will be confined to the status of the parties involved in the subject State Court proceedings.

In other words, non-members of the Northern Cheyenne Tribe or non-Indians or both non-members of the Northern Cheyenne Tribe and members of the Tribe as parties to the adoption proceedings pending in said adoption matter before said District Court, are not involved.

Therefore, the minor, Ivan Firecrow, and all other persons appearing in the State District Court adoption proceedings are members of the Northern Cheyenne Tribe of Indians and reside within the exterior boundaries of the Northern Cheyenne Indian Reservation.

From the factual situation found to exist by Judge Coate, as set forth in his Order, a copy of which is hereto annexed, it appears that the first two paragraphs of section 2 of Chapter III of the Tribal Code sets forth the Tribal law applicable to adoptions where the adoptive minor and all other parties involved in an adoption proceeding are members of the Northern Cheyenne Tribe and reside within the exterior boundaries of the Northern Cheyenne Indian Reservation. Therefore, in the matter at bar before the State District Court, it is not necessary for this Appellate Court to interpret or make any opinion as to the pro-

visions of the third paragraph of said section 2 of Chapter III of the Tribal Code.

It is the opinion of this Court, and this Court so rules, that the Tribal Court has exclusive jurisdiction of all adoptions of members of the Northern Cheyenne Tribe of Indians where it appears that the minor who is being adopted and all other parties to the adoption proceedings, which is to say, the parent and/or parents of the minor and the person and/or persons adopting said minor are each and all members of the Northern Cheyenne Tribe and each and all reside within the exterior boundaries of the Northern Cheyenne Indian Reservation.

This Court has not been called upon to decide any issue involving non-members of the Northern Cheyenne Tribe or non-Indians or both, who wish to adopt a member of the Northern Cheyenne Tribe. Therefore, this Court does not make any opinion or interpretation as to the provisions of the last (3rd) paragraph of said Section 1 of Chapter III of the Tribal Code.

It must be understood that in making this Opinion this Court recognizes the limitations of its jurisdiction. The confines of the jurisdiction of this Court are fixed by section 6 of Chapter I of the Tribal Code, which provides that the Appellate Judge---"will act as Appellate Judge for the Northern Cheyenne Tribal Court."

Therefore, this Opinion is made by the Appellate Court of the Northern Cheyenne Tribe at the request of the Honorable Alfred B. Coate, District Judge, as foresaid, and this extraordinary Opinion is not to be in any manner construed as an admission as "in rem" or "in personam" jurisdiction by the Courts of the State of Montana in the case at bar which is pending in the Sixteenth Judicial District before the Honorable Alfred B. Coate entitled, "In the Matter of the Adoption of Ivan Firecrow, a

minor".

Since this Opinion was requested by the Trial Judge of the Northern Cheyenne Tribe it is hereby ordered that a copy of this Opinion be forthwith mailed by United States mail to the Honorable Alfred B. Coate, District Judge at Forsyth, Montana and a duplicate copy be mailed to Judge Thomas Gardner, Tribal Judge.

DATED this 12th day of April, 1975.

_____
Appellate Judge of the Northern Cheyenne Tribe of Indians.

IN THE DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF ROSEBUD.

IN THE MATTER OF THE ADOPTION OF

IVAN FIRECROW,

a minor.

Adoption No. 116

ORDER

Petitioners are the daughter and son-in-law of the Respondent and have petitioned to adopt one of the Respondent's children. The natural father of the child has consented to the adoption. All of the parties to this proceeding are members of the Northern Cheyenne Indian Tribe and reside within the exterior boundaries of that reservation. Petitioners reside within Rosebud County, State of Montana.

At the hearing on the Petition the Respondent moved to dismiss the petition on the ground that the state court lacked jurisdiction over members of an Indian tribe who were residing within an Indian reservation. There is no question that this court is the proper court to hear the petition, if it has jurisdiction over Indians who are members of and residing within the boundaries of their reservation.

Jurisdiction cannot be conferred upon a court by the consent of the parties. In re Vincent's Estate, 138 Mont. 424, 304 P.2d 402. A decree rendered by a court without jurisdiction is void. In re Woodside-Florence Irr. Dist., 121 Mont. 340, 194 P.2d 241. Therefore it is most important that this court determine its jurisdiction and render a decision in this matter.

Congress, in 1948, recognized that state courts could have

jurisdiction to grant Indian adoptions. 25 U.S.C. 372 A. That statute was not repealed by the Indian Civil Rights Act of 1968, 25 U.S.C. section 1302 et seq. Congress has never conferred adoption jurisdiction upon the states by specific legislative enactment; therefore, jurisdiction to grant adoptions over Indian people by a state court must have been conferred by tribal action. In Kennerly vs. District Court, 400 U.S. 423, 426, 91 S.Ct. 480, 482, 27 L.ed 2d 507, the United States Supreme Court said:

> The Court in Williams, in the process of discussing the general question of state action impinging on affairs of reservation Indians, noted that "/e/ essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S., at 220, 79 S.Ct., at 271.

By this test, this court now holds that the Montana Constitution and the legislative enactments of this state, insofar as the jurisdiction of state courts over adoption proceedings is concerned, does not infringe on the right of reservation Indians to made their own laws.

This court further finds that jurisdiction over Indian adoptions, if there be such, could only be conferred by an enactment of the Northern Cheyenne Tribe. Their Ordinance, Chapter III, section 2, probides:

> Adoptions.
>
> The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
>
> Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal Court shall be recognized.
>
> On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon, and approve applications for adoption and upon written consent of the court, adoption proceedings affecting

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members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Court. (Emphasis added.)

This Ordinance is subject to more than one construction; therefore, this court now certifies the following questions to the highest court of that tribe, the Northern Cheyenne Supreme Court, for its interpretation:

1. Does this Ordinance confer jurisdiction on the District Court of the Sixteenth Judicial District of the State of Montana to grant adoptions, to and over, members of the Northern Cheyenne Tribe?

2. If the Ordinance confers such jurisdiction on the state court, is there any restrictions on the exercise of that jurisdiction?

In the event that the Northern Cheyenne Supreme Court does not desire to certify answers to these questions within thirty days, this court will render its final decision at the expiration of that time.

Dated this 25th day of March, 1975

Alfred B. Coate
District Judge

IN THE DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF ROSEBUD

IN THE MATTER OF THE GUARDIANSHIP OF)
~~LUCILLE M. PIRECROW~~)
~~IRA A. PIRECROW~~) LETTER OF GUARDIANSHIP
ALVINA PIRECROW)
JOSEPH PIRECROW, JR.)
RONALD W. PIRECROW)
JOHN G. PIRECROW)
IVAN L. PIRECROW)
MINORS.)

STATE OF MONTANA,)
) ss.
County of Rosebud.)

JOSEPHINE SIMPSON is hereby appointed Guardian of ~~Luella M. Pirecrow~~, ~~Ira A. Pirecrow~~, Alvina Pirecrow, Joseph Pirecrow, Jr., Ronald W. Pirecrow, John G. Pirecrow and Ivan L. Pirecrow, minors.

WITNESS, Louise Fleming Clerk of the Sixteenth Judicial District Court of the State of Montana, in and for the said County of Rosebud with the seal thereof affixed, the 11th day of March, 1970.

By order of the Court.

/s/ Louise Fleming
Clerk.

By _____
Deputy Clerk.

STATE OF MONTANA,)
) ss.
County of Rosebud.)

I, JOSEPHINE SIMPSON do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Montana, and that I will faithfully perform, according to law, the duties of Guardian of ~~Lucille M. Pirecrow~~, ~~Ira A. Pirecrow~~, Alvina Pirecrow, Joseph Pirecrow, Jr.,

Ronald W. Firecrow, John G. Firecrow, and Ivan L. Firecrow, minors.

/s/ Josephine Simpson

SUBSCRIBED AND SWORN to before me this 11th day of March, 1970.

/s/ Louise Fleming
Clerk.

By _____
Deputy Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975.

No. 75-5366

ALVA FISHER,

Petitioner,

v.

STATE OF MONTANA, ex rel IN THE MATTER of THE ADOPTION of IVAN FIRECROW, a minor by LEROY RUNSABOVE and JOSEPHINE RUNSABOVE,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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MOTION FILED

SEP 18 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5366

ALVA FISHER, *Petitioner,*

v.

STATE OF MONTANA, EX REL, in the matter of the adoption of IVAN FIRECROW, a minor by LEROY RUNSABOVE and JOSEPHINE RUNSABOVE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

MOTION AND BRIEF OF NORTHERN CHEYENNE INDIAN TRIBE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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IN THE

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OCTOBER TERM, 1975

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court for the State of Montana

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MOTION OF NORTHERN CHEYENNE INDIAN TRIBE FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Northern Cheyenne Indian Tribe respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the petitioner has been obtained. The consent of the respondents has been requested but was refused.

The interest of the Northern Cheyenne Indian Tribe arises from the fact that all parties to the adoption proceedings which gave rise to this Northern Cheyenne Indian—State of Montana jurisdiction dispute are members of the Northern Cheyenne Tribe residing within the Northern Cheyenne Reservation in Montana. Moreover, Ivan Firecrow, the minor child who is the subject of the contested state court adoption proceeding, is a ward of the Northern Cheyenne Tribal Court.

The Northern Cheyenne Reservation was created by an executive order issued by President Arthur on November 26, 1884, which directed that the land be "withheld from sale and settlement, and set apart as a reservation for the use and occupation of the Northern Cheyenne Indians. . . ." 1 Kappler, *Indian Affairs, Laws and Treaties,* 860 (1904).

The Northern Cheyenne Tribe is incorporated pursuant to the Wheeler-Howard Act, 25 U.S.C. §§ 461, *et seq.,* 48 Stat. 984. The Tribe is organized under a constitution and bylaws approved by the Secretary of the Interior on November 23, 1935. Under the authority granted the Tribe by Congress in the Wheeler-Howard Act, the Tribe has established a tribal court system and has enacted an ordinance providing for exclusive tribal court jurisdiction over adoptions of tribal members. Pursuant to this ordinance, Ivan Firecrow was ordered a ward of the Northern Cheyenne Tribal Court in 1969, five years prior to the contested state court adoption proceeding.

The exercise of state court jurisdiction clashes with the Northern Cheyenne Tribal Court order. Federal supremacy over Indian affairs and the legitimacy of

congressionally sanctioned tribal self-government are swept aside by the opinion of the Montana Supreme Court. The authority of the Northern Cheyenne Indian Tribe and its members to govern reservation activities is likewise undermined.

The interest of the Northern Cheyenne Indian Tribe as amicus curiae arises from the intrusion by the State of Montana, authorized by its supreme court, into an area reserved for federal and tribal jurisdiction. Amicus seeks to file the attached brief to advise the Court of the impact of this decision on the integrity of federal supremacy over Indian affairs and on the Northern Cheyenne Indian Tribe, as well as all other Indian tribes.

Respectfully submitted,

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September, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5366

ALVA FISHER, *Petitioner,*

v.

STATE OF MONTANA, EX REL, in the matter of the adoption of IVAN FIRECROW, a minor by LEROY RUNSABOVE and JOSEPHINE RUNSABOVE, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

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BRIEF OF NORTHERN CHEYENNE INDIAN TRIBE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is set forth in the accompanying Motion of Northern Cheyenne Indian Tribe for Leave to File Brief Amicus Curiae.

STATEMENT OF THE CASE

Amicus hereby adopts the statement as set forth in the Petition.

REASON FOR ALLOWING THE WRIT

The Ruling of the Montana Supreme Court Is in Direct Conflict with Recent Decisions Limiting the Reach of State Jurisdiction Over Indian Affairs.

The Montana Supreme Court held that a Montana state district court had subject matter jurisdiction over a petition for adoption notwithstanding the facts that the child was under an order of the Northern Cheyenne Tribal Court, and the adopting parents, the child and natural mother, all enrolled members of the Northern Cheyenne Tribe, had at all times pertinent to this case resided on the Northern Cheyenne Indian Reservation.

The Montana decision flies directly in the face of more than a century and a half of unequivocal precedent in this Court upholding the status of Indian tribes as:

> . . . 'distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.' . . . . .

McClanahan v. *Arizona Tax Commission,* 411 U.S. 164, 168 (1973), quoting *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 557 (1832). As this Court stated in *McClanahan*:

> [i]t followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries. . . .

Ibid.

This case is controlled by *McClanahan.* The pertinent federal laws—the executive orders reserving the

Northern Cheyenne lands for the use and occupation of the Northern Cheyenne Tribe, and the Wheeler-Howard Act under which the Tribe governs itself—"preclude extension of state law" on the Reservation. *McClanahan* v. *Arizona Tax Commission, supra* at 175. These federal laws carry forth Congress' responsibility to protect the unique governmental status of American Indian tribes. This Court has given special attention to Congress' concern for strengthening tribal self-government:

> Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs. 4 Stat. 729, 735. *Not satisfied solely with centralized government of Indians, it encouraged tribal governments and courts to become stronger and more highly organized.* See, e.g., the Wheeler-Howard Act, §§ 16, 17, 48 Stat. 987, 988, 25 U.S.C. §§ 476, 477. . . . [Emphasis supplied.]

Williams v. *Lee,* 358 U.S. 217, 220 (1959).

To support its astonishing ruling, the Montana Supreme Court contends that Congress in 25 U.S.C. § 372a, 54 Stat. 746, deprived the Northern Cheyenne Tribal Court of exclusive jurisdiction over reservation children. But 25 U.S.C. § 372a on its face merely provides that a person—whether an Indian or a non-Indian—can be recognized as an heir of an Indian for purposes of probating the Indian's estate if he or she has been duly adopted in either a state or tribal court proceeding. Thus, if the state court has jurisdiction, either because the adopted heir is an Indian residing

off the reservation (outside the tribe's jurisdiction) or is a non-Indian, the Secretary of the Interior in probating the Indian's estate will give full faith and credit to the state court proceeding. The statute is certainly not a congressional grant of jurisdiction over Indian children otherwise subject to exclusive tribal jurisdiction. Indeed, the Washington Supreme Court has rejected the notion that 25 U.S.C. § 372a granted Washington courts adoption jurisdiction over reservation Indians. *State* v. *Superior Court,* 57 W. 181, 356 P.2d 985, 989 (1960).

This is not the first time that the Montana Supreme Court has sought to infer a congressional grant of state jurisdiction over the affairs of reservation Indians. In *Kennerly* v. *District Court,* 400 U.S. 423 (1971), this Court in a per curiam opinion vacated and remanded a ruling of the Montana Supreme Court which held that a member of the Blackfeet Indian Tribe was subject to state court jurisdiction in a proceeding brought by a non-Indian to collect a debt arising out of a reservation transaction. This Court held that Montana had no jurisdiction to resolve a reservation dispute involving a Blackfeet Indian, because Montana had not complied with the congressional enactment under which the state could assume such jurisdiction, 25 U.S.C. §§ 1321-1326, 82 Stat. 78, but instead attempted to rely on a Blackfeet tribal resolution purporting to give the state civil jurisdiction. As in the case of the Blackfeet Reservation, Montana has never assumed civil jurisdiction over the Northern Cheyenne Reservation. And, as in *Kennerly* v. *District Court, supra,* the Montana Supreme Court has developed an impermissible theory for finding a conferral of state jurisdiction over a reservation dispute. There

simply is no basis for concluding that 25 U.S.C. § 372a grants the State of Montana the power to govern the adoption of reservation Indians.

The Northern Cheyenne Tribal Court order has been rendered a nullity by the decision of the Montana Supreme Court. Few matters are more important to Indian tribes than the ability to regulate the domestic relations of members of the reservation. *United States* v. *Quiver,* 241 U.S. 602 (1916); *DeCoteau* v. *District County Court,* —— U.S. ——, 43 L.Ed.2d 300, 326 n.8 (dissent) (1975). Thus, the right of the Northern Cheyenne Tribe as a self-governing political community to determine its own affairs, has been seriously undermined contrary to the dictates of *Williams* v. *Lee,* 358 U.S. 217 (1959).

CONCLUSION

Amicus curiae suggests that it would be appropriate for this Court summarily to vacate and remand the judgment of the Montana Supreme Court in this case as it did four years ago in *Kennerly* v. *District Court, supra.*

Respectfully submitted,

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September, 1975

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No. 75-5366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

ALVA FISHER, PETITIONER

v.

STATE OF MONTANA, EX REL., IN THE MATTER OF THE ADOPTION OF IVAN FISHER, A MINOR, BY LEROY RUNSABOVE AND JOSEPHINE RUNSABOVE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 20, 1975, inviting the Solicitor General to express the views of the United States in this case concerning state jurisdiction over tribal Indians. In our view, the decision of the Supreme Court of Montana is contrary to this Court's decisions in Williams v. Lee, 358 U.S. 217, and Kennerly v. District Court of Montana, 400 U.S. 423, and interferes with the right of the Northern Cheyenne Tribe to govern itself under the supervision of the United States. The petition should be granted and the judgment reversed.

In August 1974, Leroy and Josephine Runsabove filed a petition for the adoption of Ivan Firecrow, a minor, in the Montana District Court for the Sixteenth Judicial District. The minor, his natural parents, including his mother, Alva Fisher (petitioner) and the Runsaboves were residents of the Northern Cheyenne Indian Reservation and enrolled members of the Northern Cheyenne Tribe (Pet. App. A, 17a).[1] The Northern Cheyenne Tribe

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1/ Also Brief in Opp. 15.

is a federally recognized Indian Tribe incorporated pursuant to the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461 et seq., and has a Constitution approved by the Secretary of the Interior. Article IV, Section 1, of the tribal Constitution grants the Tribal Council the right:

* * * *

> (p) To regulate the domestic relations of members of the Tribe and of nonmembers married into the Tribe.
>
> (q) To provide for the appointment of guardians for minors and mental incompetents by ordinance or resolution subject to review by the Secretary of the Interior.

* * * *

The State of Montana has never assumed civil or ciminal jurisdiction over this reservation under Public Law 280.[2]

The state district court, relying on this Court's decision in Kennerly v. District Court of Montana, supra, 400 U.S. 423, found that in these circumstances it had no jurisdiction over the adoption of the minor unless such jurisdiction was conferred by the Tribe (Pet. App. B, 21-23). The pertinent tribal ordinance, Article III, Section 2, Revised Law and Order Ordinances, provided as follows (Pet. App. B, 22):

> Adoptions.
>
> The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon, and approve applications for adoptions among members of the Northern Cheyenne Tribe.
>
> * * * *
>
> Upon proper showing and decision by the court, such adoptions shall be binding upon all concerned and hereafter only adoptions so approved by the Tribal court shall be recognized.

2/ Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360, as amended by Title IV of the Civil Rights Act of 1968, 82 Stat. 78, 25 U.S.C. 1321 et seq. Respondents admit that the State has not assumed such jurisdiction. See Brief in Opp. 16. See, also, 78 I.D. 24-26.

> On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the Tribal Court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated in the State Courts.

The district court accordingly certified the following questions to the Appellate Court of the Northern Cheyenne Tribe (Pet. App. B, 22-23):

> 1. Does this Ordinance confer jurisdiction on the District Court of the Sixteenth Judicial District of the State of Montana to grant adoptions, to and over, members of the Northern Cheyenne Tribe?
>
> 2. If the Ordinance confers such jurisdiction on the state court, is there any restrictions [sic] on the exercise of that jurisdiction?

The Appellate Court of the Northern Cheyenne Tribe, in response to the request, issued an advisory opinion holding that the tribal ordinances give exclusive jurisdiction over adoptions to the Northern Cheyenne Tribal Court if all parties are members of the Tribe residing on the reservation (Pet. App. C, [illegible]). The district court then dismissed the petition for adoption (Pet. App. B, 23-24).

The Supreme Court of the State of Montana, on respondents' petition for supervisory writs, reversed the district court (Pet. App. A, 18-20). It held that the state courts had jurisdiction over adoption of Northern Cheyenne children prior to passage of the Indian Child Welfare Act, under which the Tribe's tribal court had exclusive jurisdiction over adoptions of Indian children who reside on the reservation, unless there is a tribal ordinance to the contrary (Pet. App. A, 19).

It further held that Congress had implicitly recognized such state jurisdiction over adoptions by tribal Indians in 25 U.S.C. 372a (Act of July 8, 1940, 54 Stat. 746), which refers to adoptions under state law in connection with Indian probate proceedings (Pet. App. A, 18). Finally it held that to deny the respondents access to the state courts because they are tribal Indians would deny them equal protection of the laws (id. at 20).

1. The Northern Cheyenne Tribe was brought under federal trusteeship by the Treaty of May 10, 1868, 15 Stat. 655. The principle of self-government, subject to regulation by Congress, implicit in the Treaty, was affirmed in the Act of February 28, 1877, 19 Stat. 254, ratifying an agreement with the Tribe. Article 8 of that agreement states:

> The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life.

The present Northern Cheyenne Reservation was created by executive orders on November 26, 1884, and March 19, 1900, 1 Kappler 860, and confirmed as the Tribe's property, held in trust by the United States, in the Act of June 3, 1926, 44 Stat. 690.

The Northern Cheyenne Reservation has thus, since its inception, been subject to the jurisdiction of the Northern Cheyenne Tribe and the United States, as is typically the case with Indian reservations, and as indicated above, the State has not obtained jurisdiction over the reservation under Pub. L. 280.

In Williams v. Lee, 358 U.S. 217, and Kennerly v. District Court of Montana, 400 U.S. 423, the Court held that state courts had no jurisdiction in civil suits brought against reservation Indians in the absence of a clear grant of jurisdiction by Congress. As the Court said in Williams v. Lee, supra, 358 U.S. at 220:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

New Langlade v. Arizona State Tax Commission, 411 U.S. 164, 168.

The Tribe's right to govern the domestic relations of its members residing on the Reservation is near the heart of the Tribe's right to govern itself. 3/ Contrary to the opinion below, it is not dependent upon the Wheeler-Howard Act. Indeed the Navajo Tribe, the jurisdiction of which the Court ruled on in New Langlade v. Arizona State Tax Commission, supra, and Williams v. Lee, supra, did not elect to take advantage of the Act's provisions, and United States v. Quiver, 241 U.S. 602, 603-604:

> From an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to the tribal customs and laws.

In his dissent in DeCoteau v. District County Court, 420 U.S. 425, 450, n. 8, Mr. Justice Douglas joined by Justices Brennan and Marshall, stated (on an issue not addressed by the majority):

> The decision here involves a problem of domestic relations which goes to the heart of tribal self-government. The question of a child's welfare cannot be decided without reference to his family structure. It involves both a sympathetic knowledge of the individuals involved, and a knowledge of the background culture. . . . [T]he Rosebud Sioux v. Rosebud Bureau, 161 Mont. 445, 507 P. 2d 893, which Mr. Justice Douglas cited, stated (507 P. 2d at 895):

> > [T]ribal officials who understand Indian culture and tradition and have administered [tribal] customs * * *.

The holding of the Montana Supreme Court that the State, as a matter of law, had jurisdiction over adoptions of the Northern Cheyenne Tribe before the Wheeler-Howard Act (Pet. App. A, 19), is thus incorrect. 4/ However, even if the State exercised such jurisdiction over the Reservation prior to 1934, there is no doubt that Congress, exercising its plenary power over Indian affairs, could and did pre-empt such an exercise of jurisdiction and delegate it to the Tribe through the Wheeler-Howard Act and the Tribe's constitution, approved under the Act. See United States v. Mazurie, 419 U.S. 544, 553-559; Antoine v. Washington, 420 U.S. 194, 204.

2. Contrary to the suggestion of the Montana Supreme Court (Pet. App. A, 19), the Act of July 8, 1940, supra, 25 U.S.C. 372a, does not recognize state jurisdiction over Indian adoptions in the circumstances of this case. That Act provides that "[i]n probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption * * *" unless the adoption was by decree of a state court, by decree of an Indian court, by a written adoption procedure approved by the superintendent of the Indian agency, or by a procedure established by a tribal authority recognized by the Secretary of the Interior." The purpose of the Act was to assure adequate proof of foreign

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holding. State ex rel. Iron Bear v. District Court, 162 Mont. 33, 512 P. 2d 1292; and Bad Horse v. Bad Horse, 161 Mont. 445, 507 P. 2d 893. Each of these was a divorce case where the tribe involved had explicitly disclosed divorce jurisdiction over its members and required that divorces be obtained from state courts.

(continued on next page)

adoptions before these are recognized by the Department of the Interior for purposes of probate. See the letter from the Secretary of the Interior in H.R. Rep. No. 1694, 76th Cong. 3d Sess. (1940): "The broad purpose of the bill is to require that there be a written record of each adoption."

The Act, to be sure, assumes that in some instances state court adoption will be recognized in federal Indian probate proceedings. For instance, if Indians living off the Northern [illegible] adopt a child living off the reservation under state law, and later moved onto the reservation, there is no doubt that the state adoption would be recognized by the Secretary. But there is nothing in 25 U.S.C. 372a giving state courts jurisdiction over an Indian adoption where they would not otherwise have it -- as in this case, where all parties are enrolled resident members of the Tribe, and the Tribe has provided its own exclusive means of adoption. Any such grant of jurisdiction to the State would have to be done expressly. Williams v. Lee, supra, 358 U.S. at 221. See also, Antoine v. Washington, supra, 420 U.S. at 199, 200. 5/

5/ The Montana Supreme Court also suggested that the respondents would be denied the rights of full citizenship and equal protection of the laws if they could not use state courts

(continued)

here, by contrast, the Tribe explicitly exercises exclusive jurisdiction over domestic relations between enrolled resident members and the defendant has been forced to litigate her case in state court over her protest.

Respondents argue (Brief in Opp. 17, 18, 19) that the State has obtained "full measure of action" under 25 U.S.C. 1322(c), and that state action [illegible] of the State has obtained jurisdiction [illegible] (as amended) but it is conceded that no such jurisdiction has been obtained here (Opp. 16).

in their attempt to adopt the minor child (Pet. App. A 20). But the Constitution does not require States to open their courts to adjudicate matters affecting tribal Indians when the relevant federal statutes and treaties provide for exclusive federal or tribal jurisdiction. Otherwise, there could never be such exclusive jurisdiction; yet the Court has recognized that state courts, without a grant of authority by Congress have no jurisdiction over causes of action against Indians (and this is such a case). See Williams v. Lee, supra; Kennerly v. District Court of Montana, supra. 6/ As this Court stated in Morton v. Mancari, 417 U.S. 535, 552:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Here, the exclusive jurisdiction of the Tribal court over adoption is derived from the Tribe's right to govern its own affairs in matters concerning its members. It is "reasonably designed to further the cause of Indian self-government," Morton v. Mancari, supra, 417 U.S. at 554, a purpose expressly recognized by this Court as "tied rationally to the fulfillment of Congress' unique obligation toward the Indians" (id. at 555).

6/ In regard to matters affecting Indian self-government, this Court stated in Kennerly, 400 U.S. at 427, that state courts have no "jurisdiction over civil causes of action by or against Indians arising in Indian country * * *" (emphasis added). See also Ex parte Crow Dog, 109 U.S. 556 upholding the exclusive jurisdiction of tribal courts over certain crimes committed by Indians within Indian country. See also Keeble v. United States, 412 U.S. 205, 209-212.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted.

ROBERT H. BORK,
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Assistant Attorney General.

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DECEMBER 1971.